No. 98-9537-CFX Title: Juatassa Sims, Petitioner
v.
Kenneth S. Apfel, Commissioner of Social Security

Docketed: May 25, 1999 Court: United States Court of Appeals for the Fifth Circuit

Entry	Date	Proceedings and Orders
	May 19 1999	Petition for writ of certiorari and motion for leave to proceed in forma pauperis filed. (Response due October 15, 1999)
	Jun 9 1999	Waiver of right of respondent Kenneth S. Apfel, Commissioner of Social Security to respond filed.
	Jun 17 1999	DISTRIBUTED. September 27, 1999
	Jun 30 1999	Response requested. (Due August 2, 1999 - NONE RECEIVED)
	Jul 28 1999	Order extending time to file response to petition until September 1, 1999.
	Aug 19 1999	Order further extending time to file response to petition until October 1, 1999.
	Sep 2 1999	Supplemental brief of petitioner Juatassa Sims filed.
	Oct 1 1999	Order further extending time to file response to petition until October 15, 1999.
	Oct 15 1999	Brief of respondent Kenneth S. Apfel, Commissioner in opposition filed.
	Oct 28 1999	REDISTRIBUTED. November 12, 1999
	Oct 28 1999	Reply brief of petitioner Juatassa Sims filed.
	Nov 19 1999	REDISTRIBUTED. November 24, 1999
	Nov 29 1999	Petition GRANTED. SET FOR ARGUMENT March 28, 2000. **********
	Jan 11 2000	Order extending time to file brief of petitioner to and including January 20, 2000.
	Jan 11 2000	Joint appendix filed.
	Jan 13 2000	Record filed.
	Jan 14 2000	Record filed.
	Jan 20 2000	Brief amici curiae of AARP, et al. filed.
	Jan 20 2000	Brief of petitioner Juatassa Sims filed.
	Jan 31 2000	CIRCULATED.
	Feb 22 2000	Order extending time to file government's brief on merits to and including Monday, February 28, 2000. Petitioner's reply brief on the merits must be filed with the Clerk and served upon opposing counsel on or before Tuesday, March 21, 2000. Rule 29.2 does not apply.
	Feb 28 2000	Brief of respondent Kenneth Apfel, Commissioner Social Security in opposition filed.
	Mar 21 2000	Reply brief of petitioner Juatassa Sims filed.
	Mar 21 2000	LODGING consistng of twenty copies of SSA Hearing material and a lower court decision submitted by counsel for the petitioner and distributed.
	Mar 28 2000	ARGUED.

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EDITOR'S NOTE

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ORIGINAL

No. _____

In the

Supreme Court of the United States

JUATASSA SIMS,

Petitioner,

vs.

KENNETH S. APFEL,
Commissioner of Social Security,

Respondent.

On Petition for a Writ of Certiorari

To the United States Court of Appeals

For the Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

Supreme Court, U.S.
FILED
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OFFICE OF THE CLERK

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QUESTION PRESENTED

May a federal court, without any statutory or regulatory authority in support thereof, and contrary to the informal non-adversarial nature of the Social Security administrative appeal process, impose an "issue exhaustion" requirement upon Social Security claimants in federal court to bar issues that were not specifically raised by the claimant during the administrative appeal process.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, Juatassa Sims (hereinafter "Sims"), respectfully petitions this Court to issue a *writ of certiorari* to review the November 6, 1998 opinion of the United States Court of Appeals for the Fifth Circuit (hereinafter "Fifth Circuit"), affirming the Commissioner of Social Security's final decision denying her application for Social Security benefits. Appendix at 1-2. Sims filed a timely petition for rehearing by the Fifth Circuit, which was denied by the Fifth Circuit on February 18, 1999. Appendix at 36.

The Fifth Circuit affirmed the Commissioner's decision, holding that it did not have jurisdiction to consider two of the three arguments Sims asserted on appeal because they were not raised before the Appeals Council. Appendix at 1-2. Because Sims believes that the Fifth Circuit's decision to apply issue exhaustion principles to bar her from raising the issues in federal district and circuit court conflicts with Supreme Court precedent and due to the express language of the statutes and regulations, as well as the non-adversarial informal nature of Social Security administrative appeal procedures, she hereby petitions for a *writ of certiorari*.

OPINIONS BELOW

On August 18, 1994, Sims filed applications for Social Security Disability Insurance (hereinafter "SSDI") and Supplemental Security Income (hereinafter "SSI") benefits, alleging disability commencing on April 1, 1992. Following the denial of her applications at the initial and reconsideration levels of review, the Administrative Law Judge, Edward T. Morriss (hereinafater "ALJ") denied Sims' claims for benefits by decision dated March 19, 1996. Sims requested review by the Appeals Council of the Social Security Administration on March 26, 1996, which was denied on May 13, 1997. Accordingly, the ALJ's decision became the Commissioner's final decision pursuant to 42 U.S.C. § 405(g).

Sims appealed to the United States District Court, Northern District of Mississippi, Delta Division, seeking review of the final decision of the Commissioner. On November 24, 1997, the United States Magistrate Judge, Eugene M. Bogen, filed his Report and Recommendation recommending affirmance of the Commissioner's decision. Appendix at 15-33. Sims subsequently filed Objections to the Magistrate Judge's Report and Recommendation. However, on January 9, 1998, the Honorable Neal B. Biggers, Jr. entered Final Judgment adopting the Report and Recommendation of the U.S. Magistrate Judge. Appendix at 3-4. The Final Judgment affirmed the decision of the Commissioner and denied Sims' claim for SSDI and SSI benefits. Id.

On February 27, 1998, Sims filed a Notice of Appeal of the January 9, 1998 Final Judgment to the Fifth Circuit Court of Appeals. Sims made three arguments in her Fifth Circuit brief. She argued that the Commissioner (1) failed to afford proper weight to the uncontroverted medical opinion of a psychologist; (2) improperly determined the extent of her residual functional capacity; and (3) violated his duty to order a consultative examination. The Fifth Circuit of Appeals rejected her arguments, and instead held that it did not have jurisdiction to consider the second and third arguments because they were not raised before the Appeals Council. Appendix at 1-2. By Order filed on February 18, 1999, the Fifth Circuit Court of Appeals denied Sims' Petition for Rehearing. Appendix at 36.

GROUNDS FOR JURISDICTION

By Order filed on February 18, 1999, the Fifth Circuit Court of Appeals denied Sims' Petition for Rehearing. The instant petition for a *writ of certiorari* is filed within 90 days of the denial of the petition for rehearing and is timely under Supreme Court Rules 13.3, 29.2, and 30.1. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTES AND REGULATIONS INVOLVED IN THIS CASE

The following statutes, 42 U.S.C. §§ 405(a) and 405(g) are at issue in the instant appeal:

42 U.S.C. § 405(a) Evidence, procedure, and certification for payments.

(a) Rules and regulations; procedures

The Commissioner of Social Security shall have full power and authority to make rules and regulations and to establish procedures, not inconsistent with the provisions of this subchapter, which are necessary or appropriate to carry out such provisions, and shall adopt reasonable and proper rules and regulations to regulate and provide for the nature and extent of the proofs and evidence and the method of taking and furnishing the same in order to establish the right to benefits hereunder.

42 U.S.C. § 405(g) Judicial review.

Any individual, after any final decision of the Commissioner of Social Security made after a hearing to which he was a party, irrespective of the amount in controversy, may obtain a review of such decision by a civil action commenced within sixty days after the mailing to him of notice of such decision or within such further time as the Commissioner of Social Security may allow. Such action shall be brought in the district court of the United States for the judicial district in which the plaintiff resides, or has his principal place of business, or, if he does not reside or have his principal place of business within any such judicial district, in the United States District Court for the District of Columbia. As part of the Commissioner's answer the Commissioner of Social Security shall file a certified copy of the transcript of the record including the evidence upon which the findings and decision complained of are based. The court shall have power to enter, upon the pleadings and transcript of the record, a judgment affirming, modifying, or reversing the decision of the Commissioner of Social Security, with or without remanding the cause for a rehearing. The findings of the Commissioner of Social Security as to any fact, if supported by substantial evidence, shall be conclusive, and where a claim has been denied by the Commissioner of Social Security or a decision is rendered under subsection (b) of this section which is adverse to an individual who was a party to the hearing before the Commissioner of Social Security, because of failure of the claimant or such individual to submit proof in conformity with any regulation prescribed under subsection (a) of this section, the court shall review only the question of conformity with such regulations and the validity of such regulations. The court may, on motion of the Commissioner of Social Security made for good cause shown before the Commissioner files the Commissioner's answer, remand the case to the Commissioner of Social Security for further action by the Commissioner of Social Security, and it may at any time order additional evidence to be taken before the Commissioner of Social Security, but only upon a showing that there is new evidence which is material and that there is good cause for the failure to incorporate such evidence into the record in a prior proceeding; and the Commissioner of Social Security shall, after the case is remanded, and after hearing such additional evidence if so ordered, modify or affirm the Commissioner's findings of fact or the Commissioner's decision, or both, and shall file with the court any such additional and modified findings of fact and decision, and a transcript of the additional record and testimony upon which the Commissioner's action in modifying or affirming was based. Such additional or modified findings of fact and decision shall be reviewable only to the extent provided for review of the original findings of fact and decision. The

judgment of the court shall be final except that it shall be subject to review in the same manner as a judgment in other civil actions. Any action instituted in accordance with this subsection shall survive notwithstanding any change in the person occupying the office of Commissioner of Social Security or any vacancy in such office.

The following regulations are at issue:

20 C.F.R. § 404.900 (1998)[1] Introduction.

(a) Explanation of the administrative review process. This subpart explains the procedures we follow in determining your rights under title II of the Social Security Act. The regulations describe the process of administrative review and explain your right to judicial review after you have taken all the necessary administrative steps. These procedures apply also to persons claiming certain benefits under title XVIII of the Act (Medicare); see 42 CFR 405.701(c). The administrative review process consists of several steps, which usually must be requested within certain time periods and in the following order:

(1) Initial determination. This is a determination we make about your entitlement or your continuing entitlement to benefits or about any other matter, as discussed in § 404.902, that gives you a right to further review.

(2) Reconsideration. If you are dissatisfied with an initial determination, you may ask us to reconsider it.

(3) Hearing before an administrative law judge. If you are dissatisfied with the reconsideration determination, you may request a hearing before an administrative law judge.

(4) Appeals Council review. If you are dissatisfied with the decision of the administrative law judge, you may request that the Appeals Council review the decision.

(5) Federal court review. When you have completed the steps of the administrative review process listed in paragraphs (a)(1) through (a)(4) of this section, we will have made our final decision. If you are dissatisfied with our final decision, you may request judicial review by filing an action in a Federal district court.

(6) Expedited appeals process. At some time after your initial determination has been reviewed, if you have no dispute with our findings of fact and our application and interpretation of the controlling laws, but you believe that a part of the law is unconstitutional, you may use the expedited appeals process. This process permits you to go directly to a Federal district court so that the constitutional issue may be resolved.

(b) Nature of the administrative review process. In making a determination or decision in your case, we conduct the administrative review process in an informal, nonadversary manner. In each step of the review process, you may present any information you feel is helpful to your case. Subject to the limitations on Appeals Council consideration of additional evidence (see §§ 404.970(b) and 404.976(b)), we will consider at each step of the review process any information you present as well as all the information in our records. You may present the information yourself or

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[1]All further references to the 1998 edition of the Code of Federal Regulations will be omitted.

have someone represent you, including an attorney. If you are dissatisfied with our decision in the review process, but do not take the next step within the stated time period, you will lose your right to further administrative review and your right to judicial review, unless you can show us that there was good cause for your failure to make a timely request for review.

20 C.F.R. § 404.975, Filing briefs with the Appeals Council.

Upon request, the Appeals Council shall give you and all other parties a reasonable opportunity to file briefs or other written statements about the facts and law relevant to the case.

20 C.F.R. § 404.976 Procedures before Appeals Council on Review.

(a) Limitation of issues. The Appeals Council may limit the issues it considers if it notifies you and the other parties of the issues it will review.

(b) Evidence.

(1) The Appeals Council will consider all the evidence in the administrative law judge hearing record as well as any new and material evidence submitted to it which relates to the period on or before the date of the administrative law judge hearing decision.

STATEMENT OF THE CASE

Sims seeks review of a judgment of the United States Court of Appeals for the Fifth Circuit. The basis for federal court jurisdiction in the court of the first instance, the U.S. District Court for the Northern District of Mississippi, was pursuant to 42 U.S.C. § 405(g), following issuance of a final decision by the Commissioner.

Sims petitions for a *writ of certiorari* to review the opinion of the Fifth Circuit affirming the decision of the district court, which affirmed the decision of the Commissioner. The following facts are material to consideration of the questions presented:

1. In her briefs filed before the Fifth Circuit, Sims argued that the administrative law judge erred as matter of law because he: (1) failed to afford proper weight to the uncontroverted medical opinion of a psychologist; (2) improperly determined the extent of her residual functional capacity; and (3) violated his duty to order a consultative examination.

2. The Fifth Circuit rejected her arguments, and instead held that it did not have jurisdiction to consider the second and third arguments because they were not raised before the Appeals Council.

3. Sims asserts that the Fifth Circuit erred in applying administrative exhaustion principles to a Social Security case, despite the lack of any Congressional or regulatory support for application of such principles in such cases.

4. Sims submits that the application of issue exhaustion principles in the context of Social Security cases conflicts with the informal non-adversarial nature of Social Security proceedings. Moreover, the application of such principles to Social Security matters violates the due process rights of claimants due to the Commissioner's failure to notify claimants that they risk waiving their right to raise arguments in federal court if they do not specifically raise

them before the Appeals Council.

REASONS FOR GRANTING THE WRIT: ARGUMENT

Petitioner Sims respectfully submits this case presents an important federal question of administrative law for which there are compelling reasons to grant the petition for a *writ of certiorari*. The Fifth Circuit failed to examine the Congressional and regulatory language or intent, prior to determining that issue exhaustion was appropriate, contrary to this Court's holding in *Darby v. Cisneros*, 113 S.Ct 2539 (1993). In *Darby*, this Court held that federal courts do not have the authority to require a claimant to exhaust available administrative remedies before seeking review where neither the relevant statute nor the agency rules specifically mandate or otherwise envision issue exhaustion as a prerequisite to judicial review. *Id.* Yet, the Fifth Circuit, in reliance on its prior holding in *Paul v. Shalala*, 29 F.3d 208, 210 (5th Cir. 1994), found that it did not have jurisdiction to consider two of Sims' arguments because they were not specifically raised to the Appeals Council. The Fifth Circuit's decision conflicts with established United States Supreme Court precedent, as neither the *Sims* decision nor the *Paul v. Shalala* decision contains any analysis of the pertinent statutory or regulatory provisions or of the nature of the Social Security administrative appeal process. The Fifth Circuit has impermissibly substituted its own views about proper administrative efficiency for the specific mechanisms that Congress and the Commissioner have chosen in violation of *Darby*.

This case raises an important issue that impacts an increasing number of claimants each year. Statistics maintained by the Social Security Administration document that in fiscal year 1997,

claimants seeking review of the Commissioner's decision filed 12,523 cases in federal court.[2] This figure represents a substantial increase from the 8,519 cases file in fiscal year 1996. An increasing number of these claimants will be deprived of the opportunity to have their day in court to vindicate their legal rights due to the application of the issue exhaustion doctrine to their cases.

Many claimants seeking Social Security and Supplemental Security Income benefits have mental disabilities and/or limited educational abilities, making them especially vulnerable. Indeed, this is the very reason that the Social Security Administration has adopted an informal, non-adversarial administrative review process. *See* 20 C.F.R. § 404.900(b). As noted by this Court, Social Security's administrative procedures should be "understandable to the layman claimant" rather than "comfortable only for the trained attorney," and should be "liberal and not strict in tone and operation." *Richardson v. Perales*, 402 U.S. 389, 400-01 (1971). The issue exhaustion doctrine undermines important rights of access to our courts by our society's disabled and elderly and results in the unjust deprivation of "the very means by which to live." *Goldberg v. Kelly*, 397 U.S. 254, 264 (1970).

As a result of this non-adversary manner of review, many Social Security claimants either represent themselves, or have family members, social workers, or others assist them, or select non-attorney representatives, as specifically authorized by the Social Security Act. *See* 42 U.S.C. § 405(a). The application of issue exhaustion will have a profound, adverse effect on these claimants:

> Approximately one-half of all social security claimants are unable to obtain attorney representation and one-third are unable to secure any representation at all in SSA

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[2]These statistics were obtained from "Key Workload Indicators for Fiscal Year 1998" prepared by the Social Security Administration Office of Hearings and Appeals. The sources of these statistics is from the "Workload Production Report, Court Case Preparation and Review Branches."

> proceedings. When the cases are then pursued in court on appeal, important constitutional, statutory, and regulatory issues have often not been identified during the administrative proceedings. Because claimants have neither identified nor raised these issues before the agency, their legal claims are thereby precluded from judicial consideration — in large part, as a result of the absence of law-school trained counsel during the administrative adjudication. In addition, lawyers for benefit claimants are now dissuaded from accepting cases on appeal to federal court that were handled without legal counsel at the administrative level because of their awareness that new arguments raised in court may be procedurally barred. Claimants whose appeals are denied due to the court's refusal to consider potentially meritorious, yet unpreserved issues will, at best, lose several years of eligibility for often much-needed benefits and, at worst, be precluded from even filing a new benefit application due to the operation of res judicata.

Dubin, *Torquemada Meets Kafka: The Misapplication of the Issue Exhaustion Doctrine to Inquisatorial Administrative Proceedings*, 97 Colum. L. Rev. 1289 at 1294-1295 (1997) (hereinafter "Dubin").

Although courts are free to impose an exhaustion requirement as a matter of judicial discretion, "***of paramount importance***" to any exhaustion inquiry is ***congressional intent***. *Darby v. Cisneros*, 113 S.Ct. at 2543. This Court has also counseled that the application of the particular doctrine to specific cases requires an understanding of the purposes and of the particular administrative scheme involved. Dubin, at 1310, *citing McKart v. United States*, 89 S.Ct. 1657 (1969).

The Fifth Circuit failed to consider whether Congress ***intended*** that claimants be required to specifically raise an issue to the Appeals Council prior to being able to raise the issue in federal court. The Fifth Circuit also did not evaluate the non-adversarial nature of the Social Security administrative appeal process and whether its purposes would be served by requiring issue exhaustion in Social Security cases. Instead, the Fifth Circuit elected to apply a ***judicially-created*** doctrine in the Social Security context, despite the lack of any congressional or regulatory support.

Entitled "Judicial Review," 42 U.S.C. § 405(g) contains the parameters and procedures for obtaining judicial review of final decisions of the Commissioner of Social Security. The plain language of this section indicates that Congress never intended that issue exhaustion principles apply in Social Security matters, except, *arguably*, if the **agency enacted regulations** requiring issue exhaustion. Section 405(g) provides that any individual, after any final decision of the Commissioner of Social Security, **may obtain a review** of such decision by a civil action. The court shall have power to enter, **upon the pleadings and transcript of the record**, a judgment affirming, modifying, or reversing the decision of the Commissioner of Social Security, with or without remanding the cause for a rehearing. The statutory language specifically provides that where the claimant failed to submit **proof** in conformity with any regulation as prescribed **by regulation,** the court shall review only the question of conformity with such regulations and the validity of such regulations. The following sentence of the section suggests that "proof" consists of *additional evidence*, as opposed to *legal arguments*.

The above statutory provisions strongly suggest that Congress wanted claimants to be able to obtain judicial review of the entire record and for issue exhaustion only to apply *if the agency enacted valid regulations requiring exhaustion where the claimant failed to submit adequate "proof" in conformity with regulations*. By specifically delineating a circumstance where issue exhaustion was required, Congress intended that issue exhaustion ***not be required*** in other circumstances.

Congress further delegated to the agency the power to establish its own rules and regulations and procedures "which are necessary and appropriate to carry out" the provisions of the Social Security Act. *See* 42 U.S.C. § 405(a). Yet, agency regulations also do not require the claimant to

specifically raise all issues to the Appeals Council to preserve the right to raise the same issues in district court. As set forth in 20 C.F.R. § 404.975, entitled "Filing Briefs with the Appeals Council," the Appeals Council shall give the claimant a reasonable opportunity to file briefs or other written statements about the facts and law relevant to the case. The regulation governing the filing of briefs to the Appeals Council does not require the claimant to specifically raise all issues in order to preserve the right to raise the same arguments in federal court. Indeed, 20 C.F.R. § 404.976, entitled "Procedures before Appeals Council on Review," specifically provides that the "Appeals Council may limit the issues it considers **if it notifies you and the other parties** of the issues it will review." *Id.* (Emphasis added). The same section also provides that the Appeals Council will consider all the evidence in the administrative law judge hearing record as well as any new and material evidence submitted to it which relates to the period on or before the date of the administrative law judge hearing decision. *Id.* The regulations further note that the "administrative review process [will be conducted] in an informal, nonadversary manner." 20 C.F.R. § 404.900.

In the current form of the regulations, the only issue that a claimant ***must raise*** administratively "at the earliest opportunity" to preserve the issue for judicial review is ALJ bias. 20 C.F.R. § 404.940. The fact that regulations specifically ***contain*** a section requiring the issue of ALJ bias to be raised administratively strongly suggests that the regulations **do not require issue exhaustion** in other situations.

It is apparent that the Social Security Administration has made a clear choice to maintain the informal nature of its administrative review procedures. The judicially created issue exhaustion doctrine not only harms claimants, but also it is an improper attempt by courts to impose procedures on the Agency that are inconsistent with its own informal, nonadversarial nature of Appeals Council

review.[3] *See* 20 C.F.R. § 404.900. This informal review process is essential to handle the growing number of claims filed each year before the Appeals Council. In fiscal year 1998, 110,159 cases were filed with the Appeals Council,[4] and it is apparent that the Agency "lacks sufficient time or resources to summon its 'expertise' and provide appropriate review" to these cases. Dubin at 1327.

Indeed, the Commissioner has initiated a pilot program to test the elimination of the Appeals Council review. *See* 20 C.F.R. § 404.966 (stating that the Commissioner is "establishing procedures . . . to test the elimination of the request for review by the Appeals Council" which will apply in randomly selected cases in which we have testes a combination of model procedures for modifying the disability claim process . . .). Additionally, as noted by Professor Dubin:

> In July 1995, the Council announced that it would 'temporarily suspend its practice including a specific response to contentions and discussion of additional evidence in notices denying requests for review.' Therefore, under current practice, no matter what 'contentions' claimants raise on administrative appeal, the Council will provide no specific responses to those arguments, thereby depriving the courts of even minimal guidance or reflection of agency 'expertise' for judicial review.

Dubin at 1329. Certainly, the judicially created issue exhaustion doctrine will have a profound impact on proceedings before the Appeals Council and impose changes which the agency has neither selected nor embraced. Indeed, the Agency will need to rewrite its entire regulatory procedures governing Appeals Council review in light of the imposition of the issue exhaustion doctrine by the courts.

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[3]While it is not part of the record, the Commissioner's General Counsel stated at a national Social Security conference that the Agency has adopted an informal policy not to apply the issue exhaustion doctrine to unrepresented claimants. Such a policy essentially ignores the judicially created issue exhaustion doctrine for a certain class of claimants. Obviously, such a selective enforcement of this doctrine has many due process implications.

[4]These figures were obtained from the same source as those obtained in footnote 2.

The adoption of the issue exhaustion doctrine will require the imposition of notices in all unfavorable hearing decisions, with warnings of the need to raise all issues to preserve the right to raise them in federal court. Such a requirement will force many claimants who now unrepresented or have family members, or other non-attorney representatives to seek legal counsel, and fundamentally change the nature of the Appeals Council review in a way that the Agency has not chosen to do. As stated in his learned law review article, Professor Dubin specifically concluded that "widespread application of issue exhaustion to SSA inquisitorial adjudication has far-reaching implications for the future of SSA judicial review, the nature of the once informal Appeals Council review, the manner and type of administrative representation, and the viability and fairness of the SSA's unusually informal administrative mode." Dubin at 1318.

In addition to the lack of Congressional and regulatory support for issue exhaustion in the Social Security context, the application of issue exhaustion weighs on the due process rights of Social Security claimants. Over the years, claimants have understood that a general request for Appeals Council review was all that was required to preserve their rights in federal court. Historically, claimants, relying upon the regulations and past history, did not submit detailed briefs to the Appeals Council. Issue exhaustion was not at issue. This was because Social Security cases have always been handled in an exceedingly informal manner, without any of the evidentiary protections generally afforded to plaintiffs in other more formal administrative contexts. *See* Dubin at 1303. Indeed, the formal rules of evidence do not even apply in Social Security hearings and the ALJ is required to "represent the claimant, represent the [Commissioner], and make an independent decision." *Id.*

Social Security regulations explicitly provide that the Appeals Council will "conduct the administrative review process in an informal, nonadversary manner." *Id.*, at 1305 *citing* 20 C.F.R.

404.900. To facilitate this informal appeal process, the SSA developed a one-page form to be filled out by claimants desiring Appeals Council review of the ALJ's hearing decision. 20 C.F.R. 422.205(a). The one page form provides the claimant with ***three lines of space*** to describe the ALJ's errors and his or her basis for administrative appeal. *Id.* This hardly supports an argument that the SSA intended that all issues be raised to avoid issue exhaustion in federal court. The claimant is instructed to present any information which he or she feels would be "helpful" to his or her case to the Appeals Council. *Id.* The regulations further state that "[s]ubject to the limitations on Appeals Council consideration of additional evidence, . . . we will consider at each step of the review process any information you present as well as all the information in our records." *Id.* The claimant is even invited to present the "information" his or herself or to have a representative. *Id.*

Most importantly, the regulation states that the claimant need only follow the required steps in a timely manner to preserve the right to judicial appeal. *Id.* Neither the regulations, statutes, nor the Commissioner notify the claimants that they will waive their rights to raise any issues that they did not raise in their appeal to the Appeals Council. To the contrary, claimants are led to believe that the only requirement is to fill out a form requesting Appeals Council review.

The Fifth Circuit failed to consider that issue exhaustion is simply incongruous with the Social Security administrative claim and appeal process. The imposition of issue exhaustion principles on the Social Security administrative appeal process is inconsistent with applicable statutes and regulations, with Congressional and regulatory intent, and with the self-proclaimed informal non-adversarial nature of the Social Security administrative appeal process. *See Richardson v. Perales*, 91 S.Ct. 1420 (1971).

Based on the precedent of *Darby v. Cisneros*, the Fifth Circuit failed to consider whether

Congress intended that issue exhaustion be required and whether the agency regulations required issue exhaustion. As indicated above, the statutory and regulatory provisions not only ***do not support*** the application of issue exhaustion principles in Social Security cases, but they also suggest, *by the inclusion of specific instances where issue exhaustion is or could be required*, that the ***current state of the statutory and regulatory law does not require issue exhaustion***.

Judges, who "are not part of either political branch of the Government," must not substitute their own judgments for decisions made by an agency that fall within the limits of the policymaking responsibilities delegated to the agency by Congress. *Chevron, U.S.A. v. Natural Res. Def. Council*, 104 S.Ct. 2778 (1984). While there is no dispute that the imposition of an issue exhaustion requirement *could be legislated by the Congress and implemented by the SSA*, ***to date, this has not occurred***, and indeed, is inconsistent with the currently informal nonadversarial Social Security administrative appeal process. Sims believes that the Fifth Circuit overstepped its boundaries when it decided to apply issue exhaustion principles to Sims' case. Not only did it fail to consider Congressional intent and the plain statutory and regulatory language governing the administrative appeal of Social Security cases, but it also substituted its own judgment for that of Congress and the SSA, as evidenced by the applicable legislation and regulations.

Sims submits that the Fifth Circuit failed to follow U.S. Supreme Court precedent governing the determination of whether issue exhaustion is appropriate in Social Security cases. In addition, the Fifth Circuit violated Sims' due process rights by enforcing the doctrine despite the Commissioner's failure to provide her with any notice of the requirement to raise all issues before the Appeals Council, else risk waiver. Appendix at 33. Based on the foregoing errors, Sims respectfully requests that this Court grant her petition for a *writ of certiorari* to allow her the opportunity to fully

brief the appropriateness of the application of issue exhaustion to Social Security proceedings.

CONCLUSION

For the foregoing reasons, Sims respectfully prays that this Court issue a *writ of certiorari* to review the OPINION of the United States Court of Appeals for the Fifth Circuit.

Robert Mario Bencivenga, Attorney at Law
Counsel of Record for Petitioner
P.O. Box 4692
Jacksonville, Florida 32201
(904) 388-8746

No. _____

In the

Supreme Court of the United States

JUATASSA SIMS,

Petitioner,

vs.

KENNETH S. APFEL,
Commissioner of Social Security,

Respondent.

On Petition for a Writ of Certiorari

To the United States Court of Appeals

For the Fifth Circuit

APPENDIX

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IN THE UNITED STATES COURT OF APPEALS\

FOR THE FIFTH CIRCUIT

U.S. COURT OF APPEALS
FILED
NOV 06 1998
CHARLES R. FULBRUGE III
CLERK

No. 98-60126
Summary Calendar

JUATASSA SIMS,

Plaintiff-Appellant,

versus

KENNETH S. APFEL,
COMMISSIONER OF SOCIAL SECURITY,

Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Mississippi
USDC No. 2:97-CV-94-B

Before POLITZ, Chief Judge, STEWART and PARKER, Circuit Judges.

PER CURIAM:*

*Pursuant to 5TH CIR. R. 47.5, the Court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

Juatassa Sims appeals the district court's affirmance of the Commissioner's denial of her application for disability insurance benefits, contending that the administrative law judge: (1) failed to afford proper weight to a psychologist's opinion that she was severely depressed; (2) improperly excluded certain of her impairments in assessing her residual function capacity; and (3) should have ordered a consultative examination to assess her mental impairments. We affirm.

We lack jurisdiction to review Sims's second and third contentions because they were not raised before the Appeals Council.[1] The first contention is without merit because the ALJ is entitled and expected to determine the credibility of medical experts and to weigh their opinions accordingly.[2] Concluding that the findings of the ALJ are supported by substantial evidence, the judgment appealed is AFFIRMED.[3]

---

[1]**Paul v. Shalala**, 29 F.3d 208 (5th Cir. 1994).

[2]**Greenspan v. Shalala**, 38 F.3d 232 (5th Cir. 1994).

[3]**Villa v. Sullivan**, 895 F.2d 1019 (5th Cir. 1990).

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
DELTA DIVISION

JAN 12 1998

By N. Smith

JUATASSA SIMS
Plaintiff

V. NO. 2:97CV94-B-B

KENNETH S. APFEL, Commissioner
of Social Security
Defendant

FINAL JUDGMENT

Upon consideration of the file and records in this case, the court finds that the report and recommendation of the United States Magistrate Judge dated November 24, 1997, was on that date duly served by regular mail upon counsel of record for the plaintiff and the defendant. On December 11, 1997, this court received an objection to the Magistrate Judge's report and recommendation from the plaintiff. Upon due consideration, the court finds that the plaintiff's objection is without merit and that the report and recommendation of the United States Magistrate Judge should be approved and adopted as the opinion of the court. It is therefore ORDERED:

that the report and recommendation of the United States Magistrate Judge dated November 24, 1997, is approved and adopted as the opinion of the court, and that the proposed findings of fact and conclusions of law therein set out are adopted as the findings of fact and conclusions of law of the court; and

CoA 34

that the final decision of the Commissioner of Social Security is affirmed, and that this action is dismissed with prejudice.

THIS, the 9th day of January, 1998.

NEAL B. BIGGERS, JR.
UNITED STATES DISTRICT JUDGE

FILED

NOV 25 1997

NORMAN L. GILLESPIE, CLE
By D. Adams
Deput

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
DELTA DIVISION

JUATASSA SIMS, Plaintiff

v. No. 2:97CV094-B-B

COMMISSIONER OF SOCIAL SECURITY, Defendant

REPORT AND RECOMMENDATIONS

On November 20, 1997 oral argument was heard by t magistrate judge in the above entitled action at Oxford pursuant t 28 U.S.C. §636(b)(4) and Local Rule M-5(c), at which plaintiff and defendant Commissioner were represented by their respective counsel.

This matter is before the court on an application by th plaintiff seeking judicial review under 42 U.S.C. §405(g) of the final decision of the Commissioner of Social Security denying her claims for disability insurance benefits under Title II of the Social Security Act and supplemental security income disability benefits under Title XVI.

The record shows that the plaintiff was born on April 27, 1951; that she has a high school education; and that her work experience has been as a cashier in a food store, order clerk at a distribution center, crimper at an auto parts manufacturer, and factory work at a hosiery mill and chair manufacturing plant. She has coverage for purposes of the special earnings requirement of

Title II of the Act through December 31, 1995. The plaintiff las worked on April 1, 1992, her claimed onset date of disability as result of anxiety/panic disorder, depression, thyroid enlargement cardiovascular system impairment, digestive system impairment hypertension, degenerative joint disease in her lumbar spine, an carpal tunnel syndrome.

FINDINGS OF THE ALJ

Applying the sequential evaluation process, 20 C.F.F §404.1520 (1992), the Administrative Law Judge (ALJ) found th plaintiff has not engaged in substantial gainful activity sin April 1, 1992, and that the medical evidence establishes tha plaintiff has degenerative disc disease of the lumbar spine, thyroid enlargement, possible carpal tunnel syndrome, exogenous obesity, depression, borderline intellectual functioning, and somatoform disorder, but that these impairments do not meet th listings.

The ALJ found that the plaintiff has the residual functional capacity to perform the exertional and non-exertional requirements of a reduced range of light work activity, reduced by mild to moderate difficulties with concentration and attention; and that plaintiff is unable to perform her past relevant work as a cashier/stock person or order picker/clerk. Having found the plaintiff unable to perform her past relevant work, the burden shifts to the Commissioner to show that she can perform a significant number of jobs existing in the national economy. Based on

vocational expert testimony, it was concluded that plaintiff coul perform such jobs as counter attendant, cashier/checker, genera officer clerk. (Findings, TR 12-21).

LAW AND ARGUMENT

The court's review is limited to whether or not substan tial evidence supports the Commissioner's decision Richardson v. Perales, 402 U.S. 389 (1971). Substantial evidence must be "more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. Id., at 401. Conflicts in the evidence are to be resolved by th Commissioner -- if there is substantial evidence to support the Commissioner's decision then the decision must be affirmed, even if there is evidence in the record which may support a contrar result. Selders v. Sullivan, 914 F.2d 614, 617 (5 Cir. 1990).

The Commissioner must apply a five-step sequential evaluation process to determine if a claimant is capable of engaging in substantial gainful activity: (1) a claimant who is working wil not be found disabled no matter what the medical findings are; (2) a claimant will not be found disabled unless he has a severe impairment; (3) a claimant whose impairment meets or equals a impairment listed in Appendix 1 of the regulations will be found disabled regardless of vocational factors; (4) a claimant who is capable of performing her prior relevant work will not be found disabled; and (5) if the claimant cannot perform her prior relevan work as a result of her impairment, then factors such as her age,

education, past work experience and residual functional capacity must be considered to determine whether she can do other work. Villa v. Sullivan, 895 F.2d 1019, 1022 (5 Cir. 1990). A finding that the claimant is or is not disabled at any step of the process terminates the evaluation. Harrell v. Bowen, 862 F.2d 471, 475 (5 Cir. 1988). The burden of proof is on the claimant for the first four steps, and then shifts to the Commissioner at step five. Anderson v. Sullivan, 887 F.2d 630, 632-33 (5 Cir. 1989).

At the hearing, plaintiff's primary contention was that there was only one examination and report of plaintiff's mental condition, that of Dr. Morris, and therefore the ALJ should have adopted his findings of marked limitations rather than substitute his own lay opinion. Counsel for the plaintiff also argued that contrary to the Commissioner's assertion that Dr. Morris was the only person noting a mental condition, the record contains several references to a mental problem -- TR 120, 132, 146, and 155.

The Commissioner argued at the hearing that there was other evidence to support the ALJ's finding that plaintiff had only slight to moderate limitations from her mental conditions. For instance, plaintiff indicated throughout her papers that she is disabled because of her back pain which began with the epidural administered at her son's birth (TR 68, 191). She has never sought any mental health treatment despite her contention that she is completely debilitated by depression and panic disorder. Although she contends that she cannot afford such treatment, and that she

does not receive Medicaid (TR 210-211), she does not indicate that she ever sought such treatment. Further, as discussed in the Commissioner's brief, the extent of plaintiff's treatment history consists of her hospitalization for the cesarean birth of her child in early 1992, three office visits with Dr. Pravin P. Patel, a general practitioner, and a one time cardiac consultative examination with Dr. J.S. Purdon. There is no record of any prior treatment for a mental condition, and Dr. Joe Ed Morris, who is the only examiner to note a mental impairment, has a documented history with Social Security of making similar findings for claimants referred by plaintiff's attorney.

The court also notes that Dr. Morris' finding that plaintiff is borderline mentally retarded does not comport with the rest of the record. For instance, Dr. Mayers found plaintiff to be cooperative, and to answer questions intelligently (TR 124). Plaintiff's testimony at the hearing was articulate, informed and intelligent (TR 177-217). Plaintiff even described herself as "smart" (TR 154, 209). This evidence contradicts Dr. Morris' finding and test results that she is suffering from borderline IQ and provides substantial evidence from which the ALJ could make a determination that her IQ is higher than the test implies. See Muse v. Sullivan, 925 F.2d 785 (5 Cir. 1991)(ALJ can determine IQ tests to be invalid if evidence supports that determination).

Thus, Dr. Morris' findings are controverted by othe evidence, and the ALJ did not err in finding that only part of Dr Morris' report should be adopted.

Other arguments raised in the briefs, but not argued a the hearing shall be addressed as follows.

Selected Use of the Record

Plaintiff complains that the ALJ selectively ignored th many references throughout the record to plaintiff's mental cond tion, particularly those set forth in Dr. Morris' report. Plainti contends that the ALJ ignored Dr. Morris' findings regarding her anxiety and depression.

The ALJ accepted Dr. Morris' findings of severe depression, somatoform disorder, and borderline intellectual functioning (TR 17). However, the ALJ rejected the severity and degree of limitation found by Dr. Morris because plaintiff had never bee treated for depression as one would expect if it were as severe a. Dr. Morris' found (TR 17). Further, despite Dr. Morris' findings regarding plaintiff's IQ, plaintiff reported that she was a straight "A" student throughout school (TR 154), and was described as "intelligent" by at least one observer (TR 64), and had a past work history of jobs requiring average intelligence (TR 189-190). This evidence is inconsistent with Dr. Morris' findings and belies plaintiff's claim that the ALJ selectively ignored the evidence.

AO 72A

Consultative Examination

Plaintiff contends that peculiarities in the medica evidence, particularly found in Dr. Mayers' report, should have alerted the ALJ to the necessity of ordering a consultative examination to explore the possibility of somatoform disorder as a cause for the irregularities, citing Latham v. Shalala, 36 F.3d 431 (5 Cir. 1994). Particularly, plaintiff states that Dr. Mayers' report that plaintiff complained of more pain on the left side o her body, but the objective findings indicated a weakness on the right, should have alerted the ALJ to a possible somatoform disorder.

The ALJ is not required to order consultative examinations unless the plaintiff has raised "the requisite suspicion" that the examination is necessary to discharge his responsibility to fully develop the record. Haywood v. Sullivan, 888 F.2d 146 1472 (5 Cir. 1989). The ALJ is not required to investigate al possible disabilities. Leggett v. Chater, 67 F.3d 558, 566 (5 Cir. 1995). Further, the ALJ has complete discretion over whether or not additional tests or medical evidence are necessary and a consultative examination is not required unless "the evidence as a whole, both medical and nonmedical, is not sufficient to support a decision..." 20 C.F.R. §404.1519a; Anderson v. Sullivan, 887 F.2d 630, 634 (5 Cir. 1987).

Defective Hypothetical

AO 72A

Plaintiff argues that the ALJ found plaintiff's condi tions of degenerative disc disease, thyroid enlargement, carpa tunnel syndrome, obesity, depression, borderline intelligence, an somatoform as severe impairments, but did not pose these impair ments in the form of a hypothetical to the vocational expert.

Whether or not the Commissioner carried the burden c proof at this step in the process depends upon the validity of t hypothetical questions posed to the vocational expert and wheth the questions reasonably incorporated the disabilities recognize by the ALJ. See Morris v. Bowen, 864 F.2d 333, 336 (5 Cir. 1988). The Fifth Circuit has recently articulated a test for determining whether or not a defective hypothetical may constitute reversibl error as follows:

> "Unless the hypothetical question posed to the vocational expert by the ALJ can be said to incorporate reasonably all disabilities of the claimant recognized by the ALJ, and the claimant or his representative is afforded the opportunity to correct deficiencies in the ALJ's questions by mentioning or suggesting to the vocational expert any purported defects in the hypothetical questions (including additional disabilities not recognized by the ALJ's findings and disabilities recognized but omitted from he question), a determination of non-disability based on such a defective question cannot stand."

Bowling v. Shalala, 36 F.3d 431, 436 (5 Cir. 1994).

The first hypothetical posed to the VE was as follows:

> "Assume I find the claimant is 44 years old. And a 12th grade education. And assume I find she can perform light work. And -- okay. Assume I find a mild to moderate difficulty with concentration and attention due to pain. She has moderate difficulty functioning due to depression and anxiety. Under that hypothetical, are there any jobs she could perform?"

(TR 214). The vocational expert answered that there were a numbe of jobs and listed them with the numbers available in the nationa economy (TR 214). The other two hypothetical questions adde severe difficulty with concentration due to pain, depression an anxiety and the VE responded that no jobs would be available t her. Plaintiff's counsel was present and could have added all c her claimed disabilities, regardless of what the ALJ ultimatel found to be severe impairments, yet counsel posed no questions t the VE.

The ALJ is not a Medical Expert

This argument is simply a different slant on plaintiff's complaints that the report of Dr. Morris should have been adopte in its entirety. The regulations grant the ALJ considerabl discretion in his review of the medical evidence, and where as her there is substantial evidence to support a decision contrary to on of plaintiff's physicians, this court must affirm it.

It is therefore recommended that the decision of the Commissioner be affirmed and the complaint dismissed with preju dice.

The parties are referred to Local Rule M-3(a) for the applicable procedure in the event any party desires to file objec tions to the findings and recommendations herein contained. The

parties are warned that any such objections are required to be i
writing and must be filed within ten days of this date. Failure t
timely file written objections to the proposed findings, conclu
sions and recommendations contained in this report will bar a
aggrieved party, except upon grounds of plain error, from attackin
on appeal unobjected-to proposed factual findings and lega
conclusions accepted by the district court. Douglass v. Unite
Services Automobile Association, 79 F.3d 1415 (5 Cir. 1996).

Respectfully submitted, this the 24th day of Novembe
1997.

UNITED STATES MAGISTRATE JUDGE

DEPARTMENT OF HEALTH & HUMAN SERVICES Social Security Administratio

Refer to: 587-48-0484

Office of Hearings and Appeals
100 W. Capitol Street
McCoy Federal Bldg., Suite 1014
Jackson, MS 39269
Telephone:
Date: MAR 19 1996

9

NOTICE OF DECISION -- UNFAVORABLE

Jautassa R. Sims
P.O. Box 208
Como, MS 38619

I have made the enclosed decision in your case. Please read this notice and the decision carefully.

If You Disagree With The Decision

If you do not agree with my decision, you may file an appeal with the Appeals Council.

How To File An Appeal

To file an appeal you or your representative must request the Appeals Council to review the decision. You must make the request in writing. You may use our Request for Review form, HA-520, or write a letter.

You may file your request at any local Social Security office or a hearing office. You may also mail your request right to the Appeals Council, Office of Hearings and Appeals, 5107 Leesburg Pike, Falls Church, VA 22041-3255. Please put the Social Security number shown above on any appeal you file.

Time To File An Appeal

To file an appeal, you must file your request for review within 60 days from the date you get this notice.

The Appeals Council assumes you got the notice 5 days after the date shown above unless you show you did not get it within the 5-day period. The Council will dismiss a late request unless you show you had a good reason for not filing it on time.

See Next Page

Time To Submit New Evidence

You should submit any new evidence you wish to the Appeals Council to consider with your request for review. 10

How An Appeal Works

Our regulations state the rules the Appeals Council applies to decide whether to review a case and in reviewing a case. These rules appear in the Code of Federal Regulations, Title 20, Chapter III, Part 404 (Subpart J) and Part 416 (Subpart N).

If you file an appeal, the Council will consider all of my decision, even the parts with which you may agree. The Council will review your case if one of the reasons for review listed in our regulations exists.

Requesting review places the entire record of your case before the Council. Review can make any part of my decision fully or partially favorable or unfavorable to you.

On review, the Council may itself consider the issues and decide your case. The Council may also send it back to an Administrative Law Judge for a new decision.

The Appeals Council Can Review The Decision On Its Own Motion

The Appeals Council can review my decision even if you do not ask it to do so. If it decides to do that, the Council will mail you a notice about its review within 60 days from the date of this notice.

If No Appeal And No Review On The Appeals Council's Own Motion

If you do not appeal and the Council does not review my decision on its own motion, you will not have a right to court review. My decision will be a final decision that can be changed only under special rules.

New Application

You have the right to file a new application at any time, but filing a new application is not the same as appealing this decision. If you disagree with my decision and you file a new application instead of appealing, you might lose some benefits, or not qualify for any benefits. My decision could also be used to deny a new application for insurance benefits, if the facts and issues are the same. So, if you disagree with this decision, you should file an appeal within 60 days.

DEPARTMENT OF
HEALTH AND HUMAN SERVICES
Social Security Administration
OFFICE OF HEARINGS AND APPEALS

DECISION

IN THE CASE OF	CLAIM FOR
Jautassa R. Sims (Claimant)	Period of Disability, Disability Insurance Benefits, and Supplemental Security Income
(Wage Earner)	587-48-0484 (Social Security Number)

On August 3, 1994, the claimant protectively filed applications for a period of disability, disability insurance benefits, and supplemental security income. She alleges disability beginning April 1, 1992, due to degenerative joint disease of the lumbar spine and possible carpal tunnel syndrome. After initial and reconsideration denials, the claimant requested a hearing. A hearing was held before me on September 12, 1995, in Greenwood, Mississippi. The claimant and vocational expert Sam Cox appeared and testified. The claimant was represented by Gary Parvin, attorney at law.

ISSUES

The general issues are whether the claimant is entitled to a period of disability and disability insurance benefits under Sections 216(i) and 223, respectively, of the Social Security Act, as amended; and whether the claimant is disabled under Section 1614(a)(3)(A) of the Act. The Social Security Act defines "disability" as the inability to engage in any substantial gainful activity due to physical or mental impairment(s) which can be expected to either result in death or last for a continuous period of not less than 12 months.

The specific issues are whether the claimant was under a "disability" and, if so, when such disability commenced and the duration thereof; and whether the disability insured status

Do You Have Any Questions? 11

If you have any questions, you may call, write or visit any Social Security office. If you visit an office, please bring this notice and decision with you. The telephone number of the local office that serves your area is (601)227-8472. Its address is 784 East Govan Street (0B14), SUITE J (0B14), Grenada, MS. 38901.

Edward T. Morriss
Administrative Law Judge

Enclosures

cc:
Gary R. Parvin
Attorney at Law
Rt. 2, Box 149C
Coffeeville, MS 38922

requirements of the Act are met for the purpose of entitlement to a period of disability and disability insurance benefits.

EVALUATION OF THE EVIDENCE

The claimant was born on April 27, 1951, and was forty years old on the alleged onset date, April 1, 1992. She has a high school education and has worked as a cashier in a food store, order clerk for a distribution center, crimper at an auto parts manufacturing plant, and worker at a hosiery mill and at a chair manufacturing plant. She met the disability insured status requirements on April 1, 1992, the alleged onset date, and continued to meet them through December 31, 1995. She has not engaged in substantial gainful activity since the alleged onset date, April 1, 1992.

At the hearing on September 12, 1995, the claimant testified that on a typical day she got her son off to school, went back to bed, and her mother came over to get her three year old to care for at her house when the claimant had nervous attacks (approximately three times a week). She stated that she cleaned one room at the time, watched some television, cooked on some days, did the washing with her daughter's help, and did some shopping. In describing her problems, she stated that she has back pain daily which began two months after the birth of her three year old son. She said that three times a month the pain is severe and she is unable to lift even ten pounds or walk as much as one fourth mile without having pain and shortness of breath. She was taking Naprosyn. In addition, the claimant stated that she has had very bad nerves and depression for twenty years, worse since 1992. She said that she has thought of "checking into" a mental health facility. According to the claimant, she has chest pain, rapid heart beat, sleeping problems, and thyroid problems. She stated that she used a heating pad for her back and that medications made her lightheaded. She said that her thyroid (gland) enlarged and felt like a "big lump" daily and that, if she got nervous, she rested for forty-five minutes to two hours. The claimant further testified that since March 1992 she has thought of suicide and has developed a plan. She said that she gained from 180 pounds to 224 pounds and had no energy. According to the claimant, no surgery has been suggested by the doctor who thought her problems would go away.

A review of the medical record shows that the claimant, when approximately eight months pregnant, was admitted to the hospital on February 7, 1992, for evaluation and further management of her pregnancy. She was given Macrodantin for a urinary tract infection and started on Inderal for fetal tachycardia. She began to feel much better and was discharged on February 9, 1992. On February 25, 1992, near the projected delivery date of her baby, she was admitted to the hospital with abdominal pain and was found to have a fibroid uterus, urinary tract infection, anemia, and gestational diabetes. She was treated and on February 26, 1992, delivered a baby boy by Caesarean section under epidural anesthesia. She also underwent bilateral tubal ligation. She was discharged on March 1, 1992. On March 4, 1992, the claimant presented to the emergency room complaining of her feet swelling, elevated blood pressure, and numbness in her left hand. Her blood pressure was 150/96 and she had 4+ pitting edema in her feet and legs. Diagnoses were hypertension and peripheral edema. Lasix was administered intramuscularly and she was given a prescription for Maxzine (Exhibit 16).

Office notes from Dr. Patel show that the claimant was seen on August 2, 1994, complaining of lower back pain two times a month since she had an epidural for a C-section. She said that two months after the epidural she developed chills up and down her spine. Examination revealed thyroidmegaly and tenderness in the L5-S1 area of the back. The doctor noted possible carpal tunnel syndrome. He prescribed Bactrim, Synthroid, Naprosyn, and Zoloft. On August 15, 1994, the doctor's impression was mild degenerative joint disease of the lumbosacral spine (Exhibit 17).

Dr. William Mayers saw the claimant on October 13, 1994, for a consultative examination. Her chief complaints were of back pain, thyroid problem, and weakness in her right arm. The claimant stated that she had an epidural anesthetic in February 1992, her back pain started in April 1992, and she has had it every day since then. She said that it is severe about one time a month, lasts for three or four days, and causes her to be bedridden. She stated that the pain radiated into both legs, the left worse than the right. She said that, when she did not have severe pain, the pain was aggravated by lifting, walking, standing, or sitting, and that she could lift ten pounds, walk only one block (due to pain in her back and shortness of breath), stand for five minutes, and sit for twenty to thirty minutes with

support to her back. She was taking Aleve, two to three times a day, for her back pain. She said that she could do her housework (taking her time) except for mopping. The claimant had an enlarged thyroid, present for five years. She was on Synthroid and said that, because of the enlargement, she had developed problems swallowing and sometimes had difficulty talking. She said that she had been told that the Synthroid might shrink her thyroid (gland) and she might be able to avoid surgery. Finally, she stated that the weakness in her right arm extended from her shoulder to her hand. She had no pain in her arm or hand unless she lifted something, and she had decreased grip strength in her right hand and occasionally dropped objects. Physical examination revealed height 5'4", weight 221 pounds, and blood pressure 131/79. Strength of the major muscle groups was 5/5 bilaterally. Grip strength was 5/5 on the left and 3/5 on the right. Straight leg raising was negative to 70 degrees on the left and was positive at 40 degrees on the right. Dr. Mayers commented that this was interesting because the claimant said she had more pain on the left when she had severe pain but on physical examination she had findings on the right. The claimant walked with a perceptible limp but did not use an assistive device. She was able to squat about three-fourths of the way but no further because of pain in her back. She could arise from this position and heel and toe walk without difficulty. Cranial nerves II-XII were intact. Deep tendon reflexes were not obtainable and Dr. Mayers could not obtain a reflex from biceps, triceps, brachioradialis, knee jerks, or ankle jerks. Pinprick was equal and normal bilaterally except for the lateral aspect of her right lower leg, corresponding with S1 dermatome. She had no decreased sensation of the right upper extremity. Dr. Mayers' impressions were: back pain, etiology undetermined, possibly degenerative disc disease; diffuse thyroid enlargement; and weakness, right hand and arm, possibly carpal tunnel syndrome. A chest x-ray was normal. Lumbar spine x-ray showed degenerative disc disease at L3-4 and L4-5 and a partially calcified cyst overlying the left side of the pelvis (Exhibit 18).

Office notes dated May 15, 1995, from Dr. Patel show that an echocardiogram showed LA slightly enlarged, aortic valve not thick--excursion within normal limits, mitral valve normal, LV post wall thin and its contraction poor. Dr. Patel referred her to two specialists (Exhibit 19)

On May 25, 1995, Dr. J. S. Purdon, a cardiologist, saw the claimant on referral from Dr. Patel. The claimant complained of a history of chest pain and some shortness of breath and fatigue. Dr. Purdon noted that much of this might be deconditioning. Physical examination revealed height 5'5 1/2 ", weight 224, and blood pressure 130/70. A stress exercise test was negative at 7 Mets energy expenditure and 94% of target heart rate. No arrhythmias were noted and after the test the claimant felt fine. Echocardiogram showed chamber sizes and left ventricular systolic function within normal limits. The mitral inflow pattern was at most borderline for diastolic dysfunction. No valvular abnormalities were appreciated and there was no evidence of effusion. After a thorough examination, Dr. Purdon diagnosed chest pain felt to be chest wall pain, possible element of reflux disease, hypothyroidism on treatment, and exogenous obesity. He commented the claimant's work-up was really negative for any sort of cardiac pain. He started her on Indocin 25 mg three times a day for five days, Pepcid 20 mg two times a day, and Flexeril one at bedtime for ten days (Exhibit 26).

On September 7, 1995, the claimant was seen by Dr. Joe Edward Morris, a psychologist, on referral from her representative, attorney Gary Parvin. On the Wechsler Adult Intelligence Scale-Revised (WAIS-R), the claimant obtained verbal, performance, and full scale IQ scores of 83, 72, and 81, respectively, which place her in the borderline range of intellectual functioning. On the Wide Range Achievement Test-Revised (WRAT-R), the claimant's scores on reading, spelling, and arithmetic were beginning of eleventh grade, beginning of eleventh grade, and beginning of tenth grade, respectively. These scores were somewhat higher than those on the WAIS-R and more within the average range. Dr. Morris stated that, cognitively, the claimant was able to understand and follow simple instructions and perform simple calculations. He said that she had symptoms of panic disorder and that she might have difficulty interacting with co-workers and receiving supervision because of her emotional instability. He diagnosed panic disorder with agoraphobia (provisional); major depressive disorder, recurrent, severe, without psychotic features, without interepisode recovery; undifferentiated somatoform disorder; borderline intellectual functioning; history of gestational diabetes, fibroid uterus, thyroid enlargement, carpal tunnel syndrome, and back pain (Exhibit 27).

After reviewing the evidence, I find that the claimant has "severe" impairments, degenerative disc disease of the lumbar spine, thyroid enlargement, possible carpal tunnel syndrome, exogenous obesity, depression, borderline intellectual functioning, and somatoform disorder. A Psychiatric Review Technique form has been completed and is appended to the decision. It properly addresses the claimant's diagnoses of depression at section 12.04, borderline intelligence at 12.05, panic disorder at 12.06, and somatoform disorder at 12.07. In evaluating the severity of the impairments under the "B" criteria of the Listings, I find that the claimant has moderate restriction of activities of daily living; moderate difficulty in maintaining social functioning; mild to moderate difficulties with concentration and attention; and that she has never had episodes of deterioration in job settings. Although Dr. Morris diagnosed panic disorder, in his summary of the claimant's daily activities he stated that she was able to drive a car short distances, go to the store, do light shopping, use the telephone, watch television, read mysteries, keep up with the news, and handle money--indicating that if she does have panic disorder, it is not marked. I do not credit Dr. Morris' finding of severe major depression as there is no history of mental health treatment as would be expected for such a severe case of depression. Dr. Morris stated that the claimant's concentration and attention "appear to be at least markedly affected." However, he also stated that the claimant was "cooperative and task oriented with good task persistence and completion." I acknowledge that her depression may cause moderate difficulties with functioning including mild to moderate difficulty with concentration and attention. The claimant has back pain which she has attributed to an epidural she received during a Caesarean section in 1992. However, there has been no consistent treatment for this and no evidence of a serious back problem from the consultative examination. Regarding her enlarged thyroid, the doctor has not suggested surgery and has stated that he believed that with medication the thyroid gland problem would go away. The claimant has not had a positive diagnosis of carpal tunnel syndrome by electromyography. Based on the record, her mental impairments and physical impairments do not meet or equal a listing in Appendix 1.

The claimant's impairments prevent her from performing some basic work activities such as lifting heavy weights and doing work that involves a high level of concentration. However, I find that she

is able to perform a reduced range of light work. In reaching this conclusion, I have specifically considered the claimant's subjective complaints, including pain. I considered the provisions of Regulations 404.1529 and 416.929, which stipulate that the effects of all symptoms, including pain, must be evaluated on the basis of a medically determinable impairment which can be expected to produce such symptoms. Further, I considered the provisions of Social Security Ruling 95-5p. Social Security Ruling 95-5p provides that all symptoms be considered in regard to their possible impact on the claimant's ability to function.

The claimant's daily activities, as described above in the report of the consultative examination by Dr. Mayers, in Dr. Morris' report, and at the hearing, indicate that the claimant's activities are only moderately restricted. The claimant is able to do household chores except mopping. Even though she has slightly decreased strength in her right hand, she can open a jar lid (if not tight), twist a doorknob, zip zippers, and button buttons. She had no joint tenderness of either hand. Range of motion of shoulders and elbows was full and strength in major muscle groups was 5/5 bilaterally. Although she could only squat three-fourths of the way down, she could heel and toe walk without difficulty and needed no assistive device for ambulating. As mentioned, there has been no consistent treatment for back trouble and there was no evidence of a serious back problem from the consultative examination. The heart specialist reported that the claimant's workup was negative for any sort of cardiac pain. According to the claimant's list of medications (undated), the claimant is taking Zoloft one a day for depression, Synthroid one a day for thyroid, and Advil and Aleve as needed for back pain. At the hearing, the claimant stated that she takes Naprosyn for back pain and that it makes her "lightheaded." However, there is no record of the claimant's complaining to doctors of adverse side effects of her medication. Based on the entire record, I find that the claimant's subjective complaints of pain and disability are not credible to the extent alleged.

At the hearing, vocational expert Sam Cox testified that the claimant's past work as a cashier/stock person was medium, semi-skilled; as an order picker/clerk was medium, unskilled; and as a clerk was medium, semi-skilled. When presented with a hypothetical question posing an individual forty-four years old, with a twelfth grade education, able to do light work, with mild

to moderate difficulty with concentration/attention due to pain, and moderate difficulty functioning due to depression, Mr. Cox stated that there are jobs that such an individual can do. He identified several representative suitable jobs in the light category and their approximate incidence: counter attendant (unskilled), 410,000 in the nation, 5,000 in the state; cashier/checker (semi-skilled), 531,000 in the nation, 6500 in the state; and general office clerk (unskilled), 2,248,000 in the nation, 18,000 in the state. As to the cashier/checker job, the vocational expert testified that skills would transfer from claimant's past work.

Based on the claimant's chronic back pain and diagnoses of degenerative disc disease and possible carpal tunnel syndrome, I find that she would not be able to return to her past relevant work because the exertional demands of the work exceed her present residual functional capacity. When a claimant establishes that she cannot perform her past relevant work because of her impairments or because she has no past relevant work, the burden shifts to the Secretary to show that the claimant can perform a significant number of jobs existing in the national economy which are consistent with her medically determinable impairments, functional limitations, age, education, and work experience. The vocational expert identified a number of such jobs in the light exertional category above.

Accordingly, I find that claimant Jautassa R. Sims is not disabled, within the meaning of the Social Security Act.

FINDINGS

After careful consideration of the entire record, I make the following findings:

1. The claimant met the disability insured status requirements of the Act on April 1, 1992, the date the claimant stated became unable to work, and continues to meet them through December 31, 1995.

2. The claimant has not engaged in substantial activity since April 1, 1992.

3. The medical evidence establishes that the claimant has "severe" impairments, degenerative disc disease, thyroid enlargement, possible carpal tunnel syndrome,

exogenous obesity, depression, borderline intelligence, and somatoform disorder, but that she does not have an impairment or combination of impairments listed in, or medically equal to one listed in Appendix 1, Subpart P, Regulations No. 4.

4. The claimant's subjective complaints of pain and limitation are not credible to the extent alleged.

5. The claimant has the residual functional capacity to perform the physical exertion and nonexertional requirements of work except for being unable to lift more than 20 pounds and being unable to perform jobs precluded by mild to moderate difficulties with concentration and attention (20 CFR 404.1545 and 416.945).

6. The claimant is unable to perform her past relevant work as cashier/stock person or order picker/clerk.

7. The claimant's residual functional capacity for the full range of light work is reduced by being unable to perform work precluded by mild to moderate difficulties with concentration and attention.

8. On the alleged onset date, April 1, 1992, the claimant was 40 years old (now 44), which is defined as a younger person (20 CFR 404.1563 and 416.963).

9. The claimant has a high school education (20 CFR 404.1564 and 416.964).

10. Based on an exertional capacity for light work and the claimant's age, education, and work experience, the vocational expert identified jobs that she could perform.

12. The claimant was not under a "disability," as defined in the Social Security Act, at any time through the date of this decision (20 CFR 404.1520(f) and 416.920(f)).

DECISION

It is my decision that, based on the application protectively filed on August 3, 1994, the claimant is not entitled to a period of disability or disability insurance benefits under sections 216(i) and 223, respectively, of the Social Security Act, and is not eligible for supplemental security income under sections 1602 and 1614(a)(3)(A) of the Act.

Edward T. Morriss
Administrative Law Judge

MAR 13 1996
Date

OHA PSYCHIATRIC REVIEW TECHNIQUE FORM

22

NAME: Jautassa R. Sims SSN: 587-48-0484

Assessment is for: Current Evaluation

Administrative Law Judge's Signature — Date

Edward J. Thomas — MAR 19 1998

I. MEDICAL SUMMARY

A. Medical Disposition(s): RFC Assessment Necessary (i.e., a severe impairment is present which does not meet or equal a listed impairment)

B. Based Upon Category(ies): 12.04, 12.05, 12.06, 12.07

II. Reviewer's Notes (Does not apply to OHA)

III. DOCUMENTATION OF FACTORS THAT EVIDENCE THE DISORDER (Evaluation of the existence of a sign or symptom CLUSTER or SYNDROME for the Listed Disorder.)

PRESENT	ABSENT			
[ ]	[x]	A.	12.02	Organic Mental Disorders
[ ]	[x]	B.	12.03	Schizophrenic, Paranoid and other Psychotic Disorders
[x]	[ ]	C.	12.04	Affective Disorders
[x]	[ ]	D.	12.05	Mental Retardation and Autism
[x]	[ ]	E.	12.06	Anxiety Related Disorders
[x]	[ ]	F.	12.07	Somatoform Disorders
[ ]	[x]	G.	12.08	Personality Disorders
[ ]	[x]	H.	12.09	Substance Addiction Disorders

C. 12.04 Affective Disorders - Disturbance of mood, accompanied by a full or partial manic or depressive syndrome, as evidenced by at least one of the following:

PRESENT-ABSENT-INSUFFICIENT EVIDENCE

1. [ ] [x] [ ] Depressive syndrome characterized by at least four of the following:

a. [ ] Anhedonia or pervasive loss of interest in almost all activities, or
b. [ ] Appetite disturbance with change in weight, or
c. [ ] Sleep disturbance, or
d. [ ] Psychomotor agitation or retardation, or
e. [ ] Decreased energy, or
f. [ ] Feelings of guilt or worthlessness, or
g. [ ] Difficulty concentrating or thinking, or
h. [ ] Thoughts of suicide, or
i. [ ] Hallucinations, delusions or paranoid thinking

2. [ ] [x] [ ] Manic syndrome characterized by at least three of the following:
a. [ ] Hyperactivity, or
b. [ ] Pressures of speech, or
c. [ ] Flight of ideas, or
d. [ ] Inflated self-esteem, or
e. [ ] Decreased need for sleep, or
f. [ ] Easy distractibility, or
g. [ ] Involvement in activities that have a high probability of painful consequences which are not recognized, or
h. [ ] Hallucinations, delusions or paranoid thinking

3. [ ] [x] [ ] Bipolar syndrome with a history of episodic periods manifested by the full symptomatic picture of both manic and depressive syndromes (and currently characterized by either or both syndromes)

4. [x] [ ] [ ] Other: depression

D. **12.05 Mental Retardation and Autism** - Significantly subaverage general intellectual functioning with deficits in adaptive behavior initially manifested during the developmental period (before age 22), or pervasive developmental disorder characterized by social and significant communicative deficits originating in the developmental period, as evidenced by at least one of the following:

PRESENT-ABSENT-INSUFFICIENT EVIDENCE

1.	[ ]	[x]	[ ]	Mental incapacity evidenced by dependence upon others for personal needs (e.g., toileting, eating, dressing or bathing) and inability to follow directions, such that the use of standardized measures of intellectual functioning is precluded*
2.	[ ]	[x]	[ ]	A valid verbal, performance, or full scale I.Q. of 59 or less*
3.	[ ]	[x]	[ ]	A valid verbal, performance, or full scale I.Q. of 60 to 70 inclusive and a physical or other mental impairment imposing additional and significant work-related limitation of function*
4.	[ ]	[x]	[ ]	A valid verbal, performance or full scale I.Q. of 60 to 70 inclusive or in the case of autism, gross deficits of social and communicative skills*
5.	[x]	[ ]	[ ]	Other: borderline intelligence

* NOTE: Items 1,2,3, and 4 correspond to Listings 12.05A, 12.05B, 12.05C, and 12.05D, respectively.

E. **12.06 Anxiety Related Disorders** - Anxiety as the predominant disturbance or anxiety experienced in the attempt to master symptoms, as evidenced by at least one of the following:

PRESENT-ABSENT-INSUFFICIENT EVIDENCE

1.	[ ]	[x]	[ ]	Generalized persistent anxiety accompanied by three of the following: a. [ ] Motor tension, or

				b. [ ] Autonomic hyperactivity, or c. [ ] Apprehensive expectation, or d. [ ] Vigilance and scanning
2.	[ ]	[x]	[ ]	A persistent irrational fear of a specific object, activity or situation which results in a compelling desire to avoid the dreaded object, activity, or situation
3.	[ ]	[x]	[ ]	Recurrent severe panic attacks manifested by a sudden unpredictable onset of intense apprehension, fear, terror, and sense of impending doom occurring on the average of at least once a week
4.	[ ]	[x]	[ ]	Recurrent obsessions or compulsions which are a source of marked distress
5.	[ ]	[x]	[ ]	Recurrent and intrusive recollections of a traumatic experience, which are a source of marked distress
6.	[x]	[ ]	[ ]	Other: some symptoms of panic disorder

F. **12.07 Somatoform Disorders** - Physical symptoms for which there are no demonstrable organic findings or known physiological mechanisms, as evidenced by at least one of the following:

PRESENT-ABSENT-INSUFFICIENT EVIDENCE

1.	[ ]	[x]	[ ]	A history of multiple physical symptoms of several years duration beginning before age 30, that have caused the individual to take medicine frequently, see a physician often and alter life patterns significantly
2.	[ ]	[x]	[ ]	Persistent nonorganic disturbance of one of the following: a. [ ] Vision, or b. [ ] Speech, or c. [ ] Hearing, or d. [ ] Use of a limb, or e. [ ] Movement and its control (e.g., coordination disturbances, psychogenic seizures, akinesia, dyskinesia), or

			f. [ ]	Sensation (e.g., diminished or heightened)
3.	[ ]	[x]	[ ]	Unrealistic interpretation of physical signs or sensations associated with the preoccupation or belief that one has a serious disease or injury
4.	[x]	[ ]	[ ]	Other: focusing on and overexaggeration of somatic symptoms

IV. RATING OF IMPAIRMENT SEVERITY

A. "B" CRITERIA OF THE LISTINGS

THE FOLLOWING FUNCTIONAL LIMITATIONS (WHICH APPLY TO PARAGRAPH B OF LISTINGS 12.02-12.04 AND 12.06-12.08 AND PARAGRAPH D OF 12.05) EXIST AS A RESULT OF THE INDIVIDUAL'S MENTAL DISORDER(S).

NOTE: ITEMS 3 AND 4 BELOW ARE MORE THAN MEASURES OF FREQUENCY. DURATION AND EFFECTS OF THE DEFICIENCIES (ITEM 3) OR EPISODES (ITEM 4) ARE DISCUSSED IN THE DECISION.

Listing(s) under which the items below are being rated: 12.04, 12.05, 12.06, 12.07

FUNCTIONAL LIMITATION AND DEGREE OF LIMITATION

1. Restrictions of Activities of Daily Living:

None[ ] Slight[ ] Moderate[x] Marked*[ ] Extreme[ ] Insuff Evid[ ]

2. Difficulties in Maintaining Social Functioning:

None[ ] Slight[ ] Moderate[x] Marked*[ ] Extreme[ ] Insuff Evid[ ]

3. Deficiencies of Concentration, Persistence or Pace Resulting in Failure to Complete Tasks in a Timely Manner (in work settings or elsewhere):

Never[ ] Seldom[ ] Often[x] Frequent*[ ] Constant[ ] Insuff Evid[ ]

4. Episodes of Deterioration or Decompensation in Work or Work-Like Settings Which Cause the Individual to Withdraw from that Situation or to Experience Exacerbation of Signs and Symptoms (which may Include Deterioration of Adaptive Behaviors):

Never[x] Once/Twice[ ] Repeated*(3+)[ ] Continual[ ] Insuff Evid[ ]

*Degree of limitation that satisfies the Listings: Extreme, Constant and Continual also satisfy that requirement.

B. Summary of Functional Limitation Rating for "B" Criteria

NO. OF FUNCTIONAL LIMITATIONS MANIFESTED AT THE LISTING LEVEL: [0]
(The number must be at least 2 to satisfy the requirements of paragraph B in Listings 12.02, 12.03, 12.04 and 12.06 and paragraph D in 12.05; and at least 3 to satisfy the requirements in paragraph B in Listings 12.07 and 12.08.)

C. "C" Criteria of the Listings

2. If 12.06 Disorder (Anxiety Related)

PRESENT-ABSENT-INSUFFICIENT EVIDENCE

[ ] [x] [ ] Symptoms resulting in **complete** inability to function independently outside the area of one's home.

(If present is checked, the requirements in paragraph C of 12.06 are satisfied.)

SOCIAL SECURITY ADMINISTRATION

Refer to: TAHBP
587-48-0484

MAY 13 1997

Office of Hearings and Appeals
5107 Leesburg Pike
Falls Church, VA 22041-3255

ACTION OF APPEALS COUNCIL ON REQUEST FOR REVIEW

Mrs. Jautassa Sims
P. O. Box 208
Como, MS 38619

Dear Mrs. Sims:

The Appeals Council has considered the request for review of the Administrative Law Judge's decision issued on March 19, 1996.

Social Security Administration regulations provide that the Appeals Council will grant a request for review where: (1) there appears to be an abuse of discretion by the Administrative Law Judge; (2) there is an error of law; (3) the Administrative Law Judge's action, findings, or conclusions are not supported by substantial evidence; or (4) there is a broad policy or procedural issue which may affect the general public interest. The regulations also provide that where new and material evidence is submitted with the request for review, the entire record will be evaluated and review will be granted where the Appeals Council finds that the Administrative Law Judge's actions, findings, or conclusion is contrary to the weight of the evidence currently of record (20 CFR 404.970 and 416.1470).

The Appeals Council has concluded that there is no basis under the above regulations for granting your request for review. Accordingly, your request is denied and the Administrative Law Judge's decision stands as the final decision of the Commissioner of Social Security in your case. In reaching this conclusion, the Appeals Council has considered the applicable statutes, regulations, and rulings in effect as of the date of this action.

The Appeals Council has also considered the contentions raised in your representative's letter dated March 26, 1996, but concluded that the contentions do not provide a basis for changing the Administrative Law Judge's decision.

If you desire a court review of the Administrative Law Judge's decision, you may commence a civil action by filing a complaint in the United States District Court for the judicial district in which you reside within sixty (60) days from the date of the receipt of this letter. It will be presumed that this letter is received within five (5) days after the date shown above unless a reasonable showing to the contrary is made. The complaint should name the Commissioner of Social Security as the defendant and should include

the Social Security number(s) shown at the top of this notice. The right to court review is provided for in sections 205(g) and 1631(c)(3) of the Social Security Act, as amended (42 U.S.C. 405(g) and 1383(c)(3)).

If you cannot file your complaint within 60 days, you may ask the Appeals Council to extend the time in which you may begin a civil action. However, the Council will only extend the time if you provide a good reason for not meeting the deadline. Your reason(s) must be set forth clearly in your request.

If a civil action is commenced, the Commissioner must be served by sending a copy of the summons and complaint by registered or certified mail to the General Counsel, Social Security Administration, Room 611, Altmeyer Building, 6401 Security Boulevard, Baltimore, MD 21235. (See rules 4(c) and (i) of the Federal Rules of Civil Procedure). In addition, you must serve the United States Attorney for the district in which you file your complaint and the Attorney General of the United States, as provided in the Federal Rules of Civil Procedure.

Sincerely yours,

ORIGINAL SIGNED BY
Peter N. Dowd
Administrative Appeals Judge

cc:
Gary R. Parvin

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 98-60126

U.S. COURT OF APPEALS
FILED
FEB 18 1999
CHARLES R. FULBRUGE III
CLERK

JUATASSA SIMS

Plaintiff - Appellant

v.

KENNETH S APFEL, COMMISSIONER OF SOCIAL SECURITY

Defendant - Appellee

Appeal from the United States District Court for the Northern District of Mississippi, Oxford

---

ON PETITION FOR REHEARING

Before POLITZ, Chief Judge, STEWART and PARKER, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above case is Denied

ENTERED FOR THE COURT:

Henry A. Politz
Chief Judge

REHG-2

CLERK'S NOTE:
SEE FRAP AND LOCAL RULES 41 FOR STAY OF THE MANDATE.

No. _____

RECEIVED
MAY 24 1999
OFFICE OF THE CLERK
SUPREME COURT, U.S.

In the

Supreme Court of the United States

JUATASSA SIMS,

Petitioner,

vs.

KENNETH S. APFEL,
Commissioner of Social Security,

Respondent.

On Petition for a Writ of Certiorari

To the United States Court of Appeals

For the Fifth Circuit

CERTIFICATE OF SERVICE

I, Robert Mario Bencivenga, a member of the bar of this Court, certify that on this date, May 19, 1999, pursuant to Supreme Court Rules 29.3 and 29.4, all parties required to be served have been served copies of the accompanying PETITION FOR A WRIT OF CERTIORARI.

I have served a copies of the PETITION FOR A WRIT OF CERTIORARI on each party to the above proceeding by depositing a copy of the above document in a sealed, first-class postage prepaid envelope, in a United States post office, said envelope being addressed to counsel of record and the Solicitor General at the following addresses:

SOLICITOR GENERAL OF THE UNITED STATES
Room 5614
Department of Justice
10th and Constitution Avenue, N.W.
Washington, D.C. 20530

SCOTT E. HEFFINGTON
Assistant Regional Counsel
Office of the General Counsel
61 Forsythe Street, S.W., Suite 20T45
Atlanta, Georgia 30303
Counsel for Respondent, Commissioner of Social Security

RALPH M. DEAN
United States Attorney
Post Office Box 886
Oxford, Mississippi 38655
Counsel for Respondent, Commissioner of Social Security

DATED this 19th day of May, 1999.

Robert Mario Bencivenga

Robert Mario Bencivenga, Attorney at Law
Counsel of Record for Petitioner
P.O. Box 4692
Jacksonville, Florida 32201
(904) 388-8746

No. _____

In the

Supreme Court of the United States

JUATASSA SIMS,

Petitioner,

vs.

KENNETH S. APFEL,
Commissioner of Social Security,

Respondent.

On Petition for a Writ of Certiorari

To the United States Court of Appeals

For the Fifth Circuit

RECEIVED
MAY 25 1999
OFFICE OF THE CLERK
SUPREME COURT, U.S.

CERTIFICATE OF SERVICE

I, Robert Mario Bencivenga, a member of the bar of this Court, certify that on this date, May 24, 1999, pursuant to Supreme Court Rules 29.3 and 29.4, all parties required to be served have been served copies of the accompanying MOTION TO PROCEED *IN FORMA PAUPERIS*.

I have served a copies of the MOTION TO PROCEED *IN FORMA PAUPERIS* on each party to the above proceeding by depositing a copy of the above document in a sealed, first-class postage prepaid envelope, in a United States post office, said envelope being addressed to counsel of record and the Solicitor General at the following addresses:

SOLICITOR GENERAL OF THE UNITED STATES
Room 5614
Department of Justice
10th and Constitution Avenue, N.W.
Washington, D.C. 20530

SCOTT E. HEFFINGTON
Assistant Regional Counsel
Office of the General Counsel
61 Forsythe Street, S.W., Suite 20T45
Atlanta, Georgia 30303
Counsel for Respondent, Commissioner of Social Security

RALPH M. DEAN
United States Attorney
Post Office Box 886
Oxford, Mississippi 38655
Counsel for Respondent, Commissioner of Social Security

DATED this 24th day of May, 1999.

Robert Mario Bencivenga, Attorney at Law
Counsel of Record for Petitioner
P.O. Box 4692
Jacksonville, Florida 32201
(904) 388-8746

RESPONSE REQUESTED

ORIGINAL

Supreme Court, U.S.
FILED
OCT 15 1999
CLERK

No. 98-9537

IN THE SUPREME COURT OF THE UNITED STATES

JUATASSA SIMS, PETITIONER

v.

KENNETH S. APFEL, COMMISSIONER OF SOCIAL SECURITY

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

SETH P. WAXMAN
Solicitor General
Counsel of Record

DAVID W. OGDEN
Acting Assistant Attorney General

WILLIAM KANTER
ROBERT D. KAMENSHINE
Attorneys

Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

RECEIVED
AFTER HOURS
OCT 15 1999
OFFICE OF THE CLERK
SUPREME COURT, U.S.

QUESTION PRESENTED

Whether the court of appeals properly declined to consider issues that petitioner failed to raise before the Social Security Administration.

IN THE SUPREME COURT OF THE UNITED STATES

No. 98-9537

JUATASSA SIMS, PETITIONER

v.

KENNETH S. APFEL, COMMISSIONER OF SOCIAL SECURITY

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinions of the court of appeals (Pet. App. 1-2) and of the district court (Pet. App. 3) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on November 6, 1998. A petition for rehearing was denied on February 18, 1999 (Pet. App. 36). The petition for a writ of certiorari was filed on May 19, 1999. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Title II of the Social Security Act provides for the payment of monthly benefits to disabled persons who have contributed to the program. 42 U.S.C. 401-433.[1] The initial disability determination is made by a state agency, acting under the authority of the Commissioner of Social Security. 42 U.S.C. 421(a). If the state agency has denied the disability claim after an initial decision and a de novo reconsideration, the claimant is entitled to a hearing before an administrative law judge (ALJ). 42 U.S.C. 405(b); 20 C.F.R. 404.944-404.961. The claimant may appeal an adverse decision by an ALJ to the Appeals Council within the Social Security Administration (SSA). 20 C.F.R. 404.967-404.982. After a claimant has exhausted those administrative procedures, he may seek judicial review in federal court. 42 U.S.C. 405(g) and (h). See Bowen v. Yuckert, 482 U.S. 137, 142 (1987); Bowen v. City of New York, 476 U.S. 467, 482 (1986); Mathews v. Eldridge, 424 U.S. 319, 330 (1976); Weinberger v. Salfi, 422 U.S. 749, 765 (1975).

2. Petitioner is a claimant who was denied Social Security disability benefits. After the state agency denied her claim, petitioner requested a hearing before an ALJ, who determined that

[1] Title XVI of the Act provides for the payment of disability benefits to certain indigent persons under the Supplemental Security Income Program. 42 U.S.C. 1382.

petitioner was not disabled under the Act. Pet. App. 26. The Appeals Council found that there was no basis for review of the ALJ's decision. Id. at 34. Petitioner was represented by counsel before the ALJ and the Appeals Council. Id. at 17, 35.

3. The district court affirmed, adopting as its opinion the report and recommendation of the United States Magistrate. Pet. App. 5-6. The court found that the ALJ properly declined to credit the report of petitioner's psychologist, Dr. Morris, because his findings were "controverted by other evidence." Id. at 10. The court then addressed and rejected several other arguments that petitioner failed to present to the ALJ. Ibid.[2]

4. The court of appeals affirmed in an unpublished per curiam opinion. Pet. App. 1-2. The court found petitioner's contention that the ALJ failed to accord proper weight to Dr. Morris' opinion "without merit because the ALJ is entitled and expected to determine the credibility of medical experts and to weigh their opinions accordingly." Id. at 2. The court further found that it "lack[ed] jurisdiction" to review petitioner's remaining

[2] The court rejected petitioner's contentions that the ALJ selectively ignored the evidence (Pet. App. 10); that the ALJ improperly failed to order a consultative examination under 20 C.F.R. 404.1519 (Pet. App. 11); and that the ALJ erred in not asking the vocational expert a hypothetical question as to the type of jobs petitioner could perform in light of the impairments found by the ALJ (Pet. App. 12).

contentions because "they were not raised before the Appeals Council." Ibid. The court therefore did not consider petitioner's contentions that the ALJ improperly excluded certain of her impairments in assessing her residual function capacity and that the ALJ should have ordered a consultative examination to assess her mental impairment. Ibid.

ARGUMENT

Petitioner argues (Pet. 7-16) that the court of appeals' refusal to consider the contentions that petitioner failed to raise before the Appeals Council conflicts with the Social Security Act and the informal nature of disability determinations. That contention, however, is incorrect and does not warrant this Court's review.

1. It is well-settled that a party's failure to raise an issue that he or she had an opportunity to present to an administrative agency ordinarily bars the party from raising the issue for the first time upon appeal of the administrative decision. See, e.g., Unemployment Compensation Comm'n v. Aragon, 329 U.S. 143, 155 (1946). Sound reasons support the principle that a party must raise an issue in an administrative proceeding in order to preserve the issue on judicial review. "[O]rderly procedure and good administration require that objections to the proceedings of an administrative agency be made while it has the

opportunity for correction in order to raise issues reviewable by the courts." United States v. L.A. Tucker Truck Lines, Inc., 344 U.S. 33, 37 (1952); accord Aragon, 329 U.S. at 155 ("A reviewing court usurps the agency's function when it sets aside the administrative determination upon a ground not theretofore presented and deprives the [agency] of an opportunity to consider the matter, make its ruling, and state the reasons for its action.").[3]

Petitioner argues (Pet. 8, 11-14) that the above principle is inconsistent with the informal and nonadversarial nature of a disability determination by the SSA. However, "[t]he same principles which guide [other cases involving judicial review of administrative action] – agency autonomy and expertise, efficient judicial review and promoting judicial economy – apply to social security administration appeals." Fernandez v. Apfel, No. 97 Civ. 6936 1998 WL 603151, at *16 (S.D. N.Y. Sept. 11, 1998); see also James v. Chater, 96 F.3d 1341, 1344 (10th Cir. 1996) ("[T]his kind

---

[3] Although the court of appeals (Pet. App. 2) stated that it lacked "jurisdiction" to review issues not raised before the agency, the doctrine is one of judicial practice and does not involve a matter of appellate jurisdiction in the technical sense. See Hormel v. Helvering, 312 U.S. 552, 557 (1941) ("There may always be exceptional cases or particular circumstances which will prompt a reviewing or appellate court, where injustice might otherwise result, to consider questions of law which were neither pressed nor passed upon by the * * * administrative agency below.").

of request for administrative review, which does not identify the issues with any particularity, effectively sandbags the Appeals Council" and "thereby deprive[s] [the court] of its informed views on those issues"). The court of appeals therefore correctly declined to review the contentions that petitioner failed to raise before the Appeals Council. Pet. App. 1-2.

2. Petitioner contends (Pet. 7, 14-15) that the decision below conflicts with this Court's decision in Darby v. Cisneros, 509 U.S. 137 (1993). That is not correct. The Court in Darby held that a claimant seeking judicial review under Section 10 of Administrative Procedure Act (APA), 5 U.S.C. 702 et seq., must first exhaust his administrative remedies only when "mandated either by statute or by agency rule." 509 U.S. at 147. Here, the Social Security Act explicitly requires the exhaustion of administrative remedies. 42 U.S.C. 405(g) and (h); see Bowen v. Yuckert, 482 U.S. 137, 142 (1987); Bowen v. City of New York, 476 U.S. 467, 482 (1986); Califano v. Sanders, 430 U.S. 99, 103 n.3 (1977); Mathews v. Eldridge, 424 U.S. 319, 330 (1976); Weinberger v. Salfi, 422 U.S. 749, 765 (1975).

Petitioner asserts (Pet. 9-11, 15) that neither the Social Security Act nor the Commissioner's implementing regulations require a claimant to raise an issue before the agency in order to preserve the issue for judicial review. Specifically, petitioner

argues that because the Act and regulations require a claimant to raise an issue before the agency in certain instances, see 42 U.S.C. 405(g) (limiting judicial review when claimant fails to "submit proof in conformity" with a regulation) and 20 C.F.R. 404.940 (requiring claimant to notify ALJ of an objection to particular ALJ on grounds of bias "at your earliest opportunity"), the claimant is not required to preserve an issue before the agency in any other instance. Nothing in Section 405(g) or the regulations, however, suggests that a court should depart from the usual practice in administrative law by considering a matter not presented to the agency in the first instance. Cf. Darby, 509 U.S. at 153-154 ("the exhaustion doctrine continues to apply as a matter of judicial discretion in cases not governed by the APA").

The prudential requirement that a litigant must have raised a matter before the Appeals Council in order to raise it in court is similar to than this Court's general practice of not reviewing an issue not raised in or passed upon by the lower courts. See, e.g., Youakim v. Miller, 425 U.S. 231, 234 (1976). It is entirely consistent with that requirement for the Appeals Council itself to consider any issue it deems relevant to the matter before it, whether or not the matter was raised by a party. See Kolstad v. American Dental Ass'n, 119 S. Ct. 2118, 2127 (1999) ("The Court has not always confined itself to the set of issues addressed by the

parties."). Accordingly, the fact that the Appeals Council, if it reviews a case, may decide to consider issues not raised by the claimant, does not suggest that a court may do so. Specification of issues to the Appeals Council facilitates the performance of its role in the administrative process by enabling it to identify cases of possible error, and therefore to correct those errors before the case goes to court. See Weinberger v. Salfi, 422 U.S. 749, 765-766 (1975). If a claimant fails to raise an issue with the Appeals Council, but then presents it for the first time in court, that purpose of the exhaustion requirement is undermined.

3. Petitioner also argues (Pet. 8-9, 13) that a rule requiring claimants to present their contentions to the Appeals Council raises due process concerns, especially in cases where the claimant is not represented by an attorney or is not advised of the rule by the agency. This case, however, does not raise any such issue, because petitioner was represented by counsel before the ALJ and the Appeals Council. See Meanel v. Apfel, 172 F.3d 1111, 1115 (9th Cir. 1999) (claimant's "fairness argument might be more persuasive if [claimant] had not been represented by counsel"). Indeed, petitioner's counsel submitted to the Appeals Council a 12 page single-spaced letter specifying petitioner's objections to the ALJ's decision. Admin. Rec. 164-176.

Moreover, at the time petitioner, through counsel, appealed her disability determination to the ALJ and the Appeals Council, the rule requiring claimants to present their contentions to the agency in order to preserve them for judicial review was well-settled in the Fifth Circuit as well as other courts of appeals. Pet. App. 2 n.1; see also p. 10, infra. Petitioner therefore cannot credibly contend that her due process rights were violated because she lacked notice of the rule -- even if we assume, arguendo, that some sort of notice were required in those circumstances, especially where the claimant is represented by counsel.

Apart from lack of any unfairness in this case, this Court's review of petitioner's due process contentions is not warranted for another reason as well. We have been informed by the SSA that, in any case in which the claimant was not represented during the administrative process, SSA as a matter of policy ordinarily does not argue that the claimant is barred from making arguments on judicial review that he failed to preserve in support of the claim that he presented in the administrative proceedings. See Supp. Pet. App. C2. Thus, the instances in which a court will find that an unrepresented claimant has waived legal issues not raised before the agency is not likely to occur with any significant frequency.

4. At the time the court of appeals issued its decision in this case, the other courts of appeals that had considered the question had also concluded that a claimant may forfeit the right to raise issues on appeal if he did not raise them before the Appeals Council. See, e.g., Krafsur v. Secretary of Health & Human Services, 757 F.2d 446, 447 (1st Cir. 1985); Krysztoforski v. Chater, 55 F.3d 857, 860 (3d Cir. 1995); Harper v. Secretary of Health & Human Services, 978 F.2d 260, 265 (6th Cir. 1992); Pope v. Shalala, 998 F.2d 473, 480 n.6 (7th Cir. 1993); Johnson v. Chater, 108 F.3d 942, 945-946 (8th Cir. 1997); Meanel v. Apfel, 172 F.3d 1111, 1115 (9th Cir. 1999); James v. Chater, 96 F.3d at 1343-1344.[4]

After the decision below was rendered, however, two courts of appeals issued decisions concluding that a claimant will not be held to have waived issues that were not presented to the Appeals Council. Harwood v. Apfel, 1999 WL 608649, at *2-*3 (8th Cir. 1999); Johnson v. Apfel, 1999 WL 675368 (7th Cir. 1999); see Supp. Pet. 1-3 and Supp. Pet. App. A and B. The Eighth Circuit in Harwood reasoned that the Appeals Council "routinely considers arguments not specifically raised by claimants before it" and that claimants are given "no advance notice that issues not specifically

[4] The Fourth Circuit has reached the same result in unpublished dispositions. See, e.g., Cline v. Chater, No. 95-2076, 1996 WL 189021, at **4 (April 19, 1996); Clagg v. Chater, No.94-2302, 1995 WL 679841, at **1 (Nov. 16, 1995).

raised will be forfeited." 1999 WL 608649 at *2.[5] The Eighth Circuit explained that the SSA form through which claimants appeal an adverse ALJ decision "provides a three-line space for claimants to articulate the grounds for appeal -- and no warning of the waiver rule." Ibid. Similarly, the Seventh Circuit in Johnson overruled its prior precedent (see, e.g. Pope v. Shalala, supra) and held that a claimant need not raise all contested issues before the agency, because the Secretary's regulations and forms do not require the claimant to present contested issues to the Appeals Council. 1999 WL 675368, at *2.

Although the decisions in Harwood and Johnson are in conflict with the decision below and the decisions of other courts of appeals, there is no occasion at this time for the Court to consider the question whether a claimant seeking social security benefits must raise an issue at the administrative level in order to preserve the issue for appeal. The SSA has informed us that it intends to amend the form that claimants and their representatives must file with the SSA in order for the agency to recognize someone other than the claimant as acting on the claimant's behalf in matters before the agency. See 20 C.F.R. 404.1707, 410.684, and

[5] As we have explained above, the fact that the Appeals Council, under existing regulations, may chose to consider issues not raised by a claimant does not mean that a court may do so.

416.1507. That form in the future will advise the claimant's representative that the failure to present an issue to the Appeals Council may preclude the claimant from raising the issue upon judicial review of the agency's decision. That notice not only responds to the concerns expressed by the Seventh and Eighth Circuits about lack of notice, but also reflects SSA's judgment, contrary to the Seventh Circuit's speculation in Johnson, 1999 WL 675368 at *2, that application of the waiver rule adopted by the court below and a number of other courts of appeals is consistent with the orderly administration of the Social Security program where the claimant is represented in the review process.

The Seventh and Eighth Circuit have had no occasion to consider the Commissioner's new procedures, and those courts therefore have not decided whether a claimant whose representative is actually notified of an obligation to present all contested issues to the Appeals Council may nonetheless raise on judicial review an issue not presented to the agency. It therefore would be premature for this Court to consider that question until the courts of appeals have considered the question presented in light of the change in SSA's procedures.

5. This case is not ripe for this Court's review for another reason as well. Quite aside from the revision of notices to claimant's representatives, the extent to which a claimant must

present an issue to the Appeals Council is a matter that may be conclusively resolved by regulation. See 42 U.S.C. 405(a). In 1994, the Commissioner of Social Security released a study and proposal for a major restructuring of the administrative process for reviewing disability claims. Social Security Admin., U.S. Dept' of Health and Human Services, Pub. No. 01-005, Plan for a New Disability Claim Process (1994), reprinted at 59 Fed. Reg. 47,887 (Sept. 18, 1994). We have been informed by the Social Security Administration that, in April 1997, it began testing models that include several changes to its disability determination procedures. See, e.g., 20 C.F.R. 404.906, 404.943, 416.1406, 416.1443. One change currently being tested is the elimination altogether of requests for review by the Appeals Council. 20 C.F.R. 404.966, 416.1466. Selection of cases for those tests in eleven States began in April 1997, and adjudication under the modified process continues. Because the question presented in this case can be conclusively resolved by regulation, and because the Social Security Administration has the matter under review, we do not believe that review by this Court is warranted at the present time. Cf. Braxton v. United States, 500 U.S. 344, 348-349 (1991); Richardson v. Wright, 405 U.S. 208, 209 (1972) (per curiam).

We have similarly relied on ongoing evaluation of possible changes in the Appeals Council's role or procedures in opposing

certiorari in other cases in which a circuit conflict had arisen on a different legal issue, and the Court has denied certiorari. See Falge v. Apfel, 119 S. Ct. 907 (1999); Roark v. Chater, 519 S. Ct. 1094 (1997); Sullins v. Shalala, 513 U.S. 1076 (1995). The Court should do the same here, especially since SSA in any event has undertaken to address the question in its revised notice in cases involving represented claimants.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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OCTOBER 1999

IN THE SUPREME COURT OF THE UNITED STATES

NO. 98-9537

JUATASSA SIMS, PETITIONER

v.

KENNETH S. APFEL, COMMISSIONER OF SOCIAL SECURITY

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CERTIFICATE OF SERVICE

It is hereby certified that all parties required to be served have been served copies of the **BRIEF FOR THE UNITED STATES IN OPPOSITION**, by Federal Express and first class mail, postage prepaid, on this 15th day of October, 1999.

SEE ATTACHED SERVICE LIST

Seth P Waxman/ks

SETH P. WAXMAN
Solicitor General
Counsel of Record

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No 98-9537

In the

Supreme Court of the United States

JUATASSA SIMS,

Petitioner,

vs

KENNETH S. APFEL,
Commissioner of Social Security,

Respondent

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On Petition for a Writ of Certiorari

To the United States Court of Appeals

For the Fifth Circuit

REPLY TO BRIEF FOR THE RESPONDENT IN OPPOSITION

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REPLY TO BRIEF FOR THE RESPONDENT IN OPPOSITION

Petitioner, JUATASSA SIMS (hereinafter "Sims"), hereby replies to the Brief for the Respondent in Opposition filed by the Commissioner of Social Security (hereinafter "Commissioner's Brief") Sims specifically responds to the Commissioner's Brief as follows (1) there is a clear split of authority among the federal circuit courts of appeal regarding whether claimants should be required to specifically raise all issues to the Appeals Council to preserve such issues for appeal in federal courts, (2) because of this clear split in authority, claimants are not uniformly treated among the twelve judicial circuits, resulting in the inconsistent and unequal administration of a national benefit program, and (3) the Commissioner's unofficial proposed modification to the Appeals Council Request for Review form and the alleged upcoming changes to the administrative appeals structure will not adequately resolve the issues presented herein

The question presented by Sims in her Petition for a *Writ of Certiorari* is ripe and is appropriate for consideration by this Court at this time Delay will serve no purpose and will only result in more inequality in the administration of a national benefit program that heretofore has been regarded as a non-adversarial informal system Sims respectfully urges this Court to issue a *writ of certiorari* and to resolve the clear inconsistency among the federal circuits on whether issue exhaustion is required during the pendency of Appeals Council review [1]

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[1]On a preliminary note, the Commissioner's Brief incorrectly states that the district court addressed and rejected several arguments that Sims failed to present to the ALJ Commissioner's Brief at 3 While the Commissioner is correct that the district court addressed the issues presented on the merits, the Commissioner is incorrect in so far as he implies that the district court made any statement as to issue exhaustion In fact, in its decision, the district court did not even address issue exhaustion or hold that Sims waived her rights to raise issues before the district court *See* Appendix to Sims Petition for a Writ of Certiorari (hereinafter "Appendix" at 15-33 The Commissioner failed to object to the Magistrate Judge's Report & Recommendation that simply addressed the issues on the merits or file a notice of cross appeal with the Fifth Circuit Despite this fact, the Fifth Circuit held that it had no jurisdiction to consider two of Sims' three arguments *Id* at 1-2

ARGUMENT

I. THERE IS A CLEAR SPLIT OF AUTHORITY AMONG THE FEDERAL CIRCUIT COURTS OF APPEAL REGARDING WHETHER CLAIMANTS SHOULD BE REQUIRED TO SPECIFICALLY RAISE ALL ISSUES TO THE APPEALS COUNCIL TO PRESERVE SUCH ISSUES FOR APPEAL IN FEDERAL COURTS.

As argued in Sims' Supplemental Brief in Support of Petition for a *Writ of Certiorari* (hereinafter "Supplemental Brief"), there is a clear split of authority among the federal circuits regarding whether issue exhaustion principles apply to bar claimants from raising issues in federal court that they did specifically raise before the Appeals Council. *See* Supplemental Brief at 2-3. In his brief, the Commissioner even acknowledges this split in authority among the federal circuit courts of appeal on whether issue exhaustion requirements apply at the Appeals Council level as a prerequisite to raising issues before the federal courts. See Commissioner's Brief at 10. Significantly, the Commissioner also essentially ***concedes*** that the Fifth Circuit's decision in *Sims* is erroneous. *Id.* at 5, n.3. Specifically, the Commissioner admits that the Fifth Circuit's absolute position in *Sims* that it is jurisdictionally barred from considering issues not raised before the Appeals Council is incorrect, arguing instead that the doctrine is "one of judicial practice." *Id.*

As noted in the Supplemental Authority filed in this case, based on the recent decisions of *Harwood v. Apfel*, 186 F.3d 1039 (8th Cir. 1999) and *Johnson v. Apfel*, 1999 WL 675368, __ F.3d __ (7th Cir. Aug. 30, 1999, *amended* Sept. 30, 1999),[2] there is now a clear conflict between the Fifth Circuit and the Seventh and Eighth Circuits regarding the issues presented in this case. In *Sims*, the

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[2]On September 30, 1999, the Seventh Circuit amended its initial decision in *Johnson v. Apfel*, *supra* as follows:

> the first two lines on page four ("the Council spends no more than 10 minutes per appeal, on average, Dubin, *supra*, 97 Colum. L. Rev. at 1326 n. 181") is (sic) changed to read "it should take only 10 minutes to fill out the form. 58 Fed. Reg. 28596 (May 14, 1992)."

Fifth Circuit held that it did not have ***jurisdiction*** to consider Sims' arguments because she had not raised them administratively before the Appeals Council. *See* Appendix at 1-2. On the other hand, the Seventh and Eighth Circuits *completely reject* the application of issue exhaustion at the Appeals Council level of administrative appeal in a *jurisdictional* or a *judicial practice* sense. Other circuits seem to apply the doctrine as a matter of perceived judicial discretion, without any discussion of whether issue exhaustion is appropriate in the informal, nonadversarial context of Social Security appeals. For the convenience of this Court, the following chart outlines the clear conflict between the circuits regarding whether and how issue exhaustion even applies in the Appeals Council context:

Jurisdiction	Circuit Court Case Citations	Issue Exhaustion Required?	Holding
First Circuit	No Decision[3]		
Second Circuit	No Decision		
Third Circuit	No Decision[4]		
Fourth Circuit	No Published Decision Unpublished Decision - *Sayre v. Chater*, 113 F.3d 1232 (Table), No. 95-3080, 1997 WL 232305, at *2 (4th Cir. May 8, 1997)	Yes	The Fourth Circuit reasoned that it was inappropriate for courts reviewing appeals of agency decisions to consider arguments not raised before the administrative agency involved

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[3]The First Circuit case cited by the Commissioner in his brief, *Krafsur v. Secretary of Health and Human Services*, 757 F.2d 446, 447 (1st Cir. 1985), does not specify whether the claimant was barred from raising an issue before the circuit court due to the failure of the claimant to raise the issue before the district court versus the Appeals Council. *See* Commissioner's Brief at 10.

[4]The Third Circuit case cited by the Commissioner in his brief of *Krysztoforski v. Chater*, 55 F.3d 857, 860 (3d Cir. 1995) also is unclear whether the Third Circuit held that an issue must be raised before either the ALJ or the district court, or both the ALJ and the district court for the issue to be preserved for consideration by the circuit court. *See* Commissioner's Brief at 10.

Jurisdiction	Circuit Court Case Citations	Issue Exhaustion Required?	Holding
Fifth Circuit	*Sims v. Apfel* (the case before this Court)	Yes	The Fifth Circuit held that it did not have jurisdiction to consider issues not raised to the Appeals Council
Sixth Circuit	*Harper v. Secretary of Health and Human Servs.*, 978 F 2d 260, 265 (6th Cir 1992)	Yes	The Sixth Circuit held that because the record did not indicate that the claimant raised an issue administratively, "[it was] not in a position to consider the issue "
Seventh Circuit	*Johnson v. Apfel*, No 98-4284, __ F 3d __ (7th Cir Aug 30, 1999, *amended* Sept 30, 1999)	No	The Seventh Circuit (J Posner) overruled prior decisions that held that issue exhaustion was required Chief Judge Posner analyzed the Social Security appeal process and relied upon the lack of any regulatory support, the lack of enforcement by the agency of issue exhaustion, and the lack of notice to claimants
Eighth Circuit	*Harwood v. Apfel*, __ F 3d __, 1999 WL 608649 (8th Cir Aug 13, 1999)	No	The Eighth Circuit refused to apply issue exhaustion principles after a careful analysis of the Social Security benefit process
Ninth Circuit	*Meanel v. Apfel*, 172 F 3d 1111, 1115 (9th Cir 1999)	Yes	The Ninth Circuit upheld issue exhaustion principles, finding that issue exhaustion applies to claimants absent a manifest injustice
Tenth Circuit	*James v. Chater*, 96 F 3d 1341 (10th Cir 1996)	Yes	The Tenth Circuit held that issue exhaustion principles applied on a prospective basis only, after publication of the *James* decision

Jurisdiction	Circuit Court Case Citations	Issue Exhaustion Required?	Holding
Eleventh Circuit	*Kelley v. Apfel*, 185 F 3d 1211 (11th Cir 1999)	Yes	The Eleventh Circuit refused to consider the claimant's third argument because the claimant did not raise the argument before the administrative agency or the district court
D C Circuit	No Decision		

The foregoing table illustrates the division among the circuits on whether and how issue exhaustion should apply to claimants who appeal to the Appeals Council as a prerequisite to arguing the same issues in federal court The Fifth Circuit maintains the most extreme position of all the circuits which have applied the issue exhaustion doctrine to bar claims In *Sims*, the Fifth Circuit held that it did not have jurisdiction to consider Sims' arguments Appendix at 1-2 The other circuits upholding issue exhaustion either are not clear on whether it is a jurisdictional requirement or simply apply the doctrine without much analysis

The Seventh and Eighth Circuits have had the benefit of all of these decisions and have rejected the application of issue exhaustion principles in Social Security cases *See Johnson*, 1999 WL 706635 at *2, *Harwood*, 186 F 3d at 1042 The Seventh Circuit even overruled its prior cases and held that issue exhaustion did not apply *Johnson*, 1999 WL 706635 at *2 Chief Judge Posner carefully analyzed the lack of regulations, the lack of notice, and the lack of uniform enforcement by the Commissioner *Id.* After completing his analysis, he admitted that the doctrine had no application in the current regulatory environment, and even went so far as to ***overrule at least six prior published Seventh Circuit decisions*** holding or containing language to the contrary He stated that the prior Seventh Circuit decisions, as well as the Tenth Circuit and Fifth Circuit positions,

"***could not be squared with the regulations governing appeals to the Appeals Council***" *Id* (Emphasis added) Because the *Johnson* decision overrules prior decisions of the Seventh Circuit, Chief Judge Posner circulated the decision to the full court, as required by its local rules As stated in the decision, "*[n]o judge in regular active service asked that the case be heard en banc*" *Id*

In *Harwood*, the Eighth Circuit likewise refused to apply issue exhaustion principles to bar claimants from raising issues in federal court that were not specifically raised before the Appeals Council *Harwood*, 186 F 3d at 1042 The Eighth Circuit's opinion is similar in content to Judge Posner's Seventh Circuit opinion Both focus on the failure of the Commissioner to itself enforce the waiver, the nonadversarial nature of the Social Security benefit administration process, the lack of notice to claimants of such a requirement, and the lack of well-reasoned support in the case law or the regulations for imposing such a requirement *See Harwood*, 186 F 3d at 1042-1043, *Johnson*, 1999 WL 706635 at *2

The above summary of the circuit court law establishes that the issue exhaustion doctrine is a critical matter and is not being consistently applied throughout the federal circuits On this basis and for the reasons set forth in her Petition for a *Writ of Certiorari* and Supplemental Brief, and for the purpose of ensuring the uniform administration of the national Social Security benefit program, Sims respectfully requests that the Supreme Court grant her Petition for a *Writ of Certiorari*

II. BECAUSE OF THIS CLEAR SPLIT IN AUTHORITY, CLAIMANTS ARE NOT UNIFORMLY TREATED AMONG THE TWELVE JUDICIAL CIRCUITS, RESULTING IN THE INCONSISTENT AND UNEQUAL ADMINISTRATION OF A NATIONAL PROGRAM

The existence of a split in authority on this issue among the federal circuits guarantees that claimants will not be uniformly treated, even though they are all seeking benefits through the same national Social Security program Indeed, the Commissioner himself acknowledges that the Social Security Administration *does not always* raise issue exhaustion as a defense Commissioner's Brief

at 9 Evidently, the Commissioner has internal policies that would "ordinarily" protect unrepresented claimants from the application of the doctrine on a "significant frequency" *Id* Thus, the Commissioner admits that the doctrine is not even uniformly enforced by his own staff

The Commissioner tacitly concedes that issue exhaustion in the Social Security appeals context is not required by current regulations, and instead argues that it is a matter of *appropriate* judicial discretion Commissioner's Brief at 5, n 3 and 8 On the other hand, the Commissioner suggests that this Court should not even consider the issue because it is intending to modify various forms at the administrative level, thereby implying that the modifications will resolve all the concerns *Id* at 11-12 If the current state of affairs is acceptable and without deficiencies, then why is the Commissioner suggesting changes in the administrative procedures? It is apparent that the Commissioner realizes that the issue exhaustion doctrine is not uniformly applied around the country, and that the lack of uniform application is resulting in inequity in the administration of a national benefits program

The Commissioner's suggestion that the SSA's internal policies somehow ensure that the doctrine is not used against unrepresented claimants is faulty at best The Fifth Circuit believes that it is jurisdictionally barred from considering issues that were not raised on appeal to the Appeals Council *See* Appendix at 1-2 The hurdle that must be met to overcome a jurisdictional bar is significantly greater than one of judicial discretion The Fifth Circuit's position on issue exhaustion conflicts with all the other circuits which have considered the issue In theory, it is irrelevant whether the Commissioner's staff elects to raise the issue, since the federal courts have been instructed that they do not have jurisdiction to consider such issues, regardless of whether the government even raises issue exhaustion

An example of the harshness of the Fifth Circuit's policy was outlined by Professor Dubin

in the article cited extensively by both the Seventh and Eighth Circuits in *Johnson* and *Harwood*. *See Johnson* ,1999 WL 706635 at *2, *Harwood*, 186 F 3d at 1042-1043, *citing* Jon C Dubin, *Torquemada Meets Kafka: The Misapplication of the Issue Exhaustion Doctrine to Inquisatorial Administrative Proceedings*, 97 Colum L Rev 1289 at 1316-1317 (1997) (hereinafter "Dubin") As noted by Professor Dubin, in an early unpublished decision, *Lopez v. Shalala*, No 94-50139 (5th Cir Dec 22, 1994), "the Fifth Circuit signaled that it intends to apply issue exhaustion broadly to limit claimant's access to federal judicial review " *Id* at 1316 In *Lopez*, the claimant, represented by a legal aid paralegal before the Appeals Council, asserted in the three lines provided on SSA's approved appeal form, the following grounds "I am disabled and unable to work I also ask that you please consider by age (63), limited education (3rd grade in Mexico), inability to communicate in english (sic) & work history " *Id* at 1317

Represented by legal counsel for the first time on appeal, the claimant raised various constitutional and due process arguments regarding the failure of the agency to provide an independent Spanish-speaking interpreter at the hearing, its consideration and reliance on an interview's report in English neither signed by nor translated to the claimant, and the failure to develop the record on behalf of a non English-speaking claimant lacking representation by legal counsel However, the Fifth Circuit held that it lacked jurisdiction to consider these arguments because

> they had not been 'specifically presented' in the administrative proceedings as required under *Paul*.[6] The claimant's request for review that the Appeals Council "'consider' his 'inability to communicate in English'" was "too indefinite to confer jurisdiction for [the court] to address his current arguments concerning the ALJ's conduct of hearing " Finally, "representation by a paralegal rather than an attorney [was] not cause" for failing to present these constitutional and administrative law arguments to the agency

[6]*Paul v. Shalala*, 29 F 3d 208 (5th Cir 1994)

Id at 1317-1318 (citations omitted)

Significantly, recent figures released by the Office of Hearings and Appeals reveal that in 1998, only 69 1% of claimants were represented by attorneys at the hearing level.[6] Non-attorney representatives (such as social workers and legal aid staff members) were involved in 16 6% of the hearings Additionally, other individuals, including family members or friends, were present at 26 3% of all hearings

The Commissioner's internal policies (which evidently do not appear to have been reduced to writing for review since they were not attached to the Commissioner's Brief) do not specify whether different rules apply to non-attorney representatives It is unclear whether non-attorney representatives, including social workers, family members, and others, will be held to the same standard as attorneys If so, should they be, given their lack of legal training? Is requiring the same specificity in arguments tantamount to authorizing the practice of law without a license? Claimants will be forced to obtain attorneys at the Appeals Council level - hardly reminiscent of a non-adversarial informal process As Professor Dubin noted, Social Security claimants who are unable to obtain attorney representation or any representation, are at a distinct disadvantage in appealing denials

> When the cases are then pursued in court on appeal, important constitutional, statutory, and regulatory issues have often not been identified during the administrative proceedings Because claimants have neither identified nor raised these issues before the agency, their legal claims are thereby precluded from judicial consideration — in large part, as a result of the absence of law-school trained counsel during the administrative adjudication In addition, lawyers for benefit claimants are now dissuaded from accepting cases on appeal to federal court that were handled without legal counsel at the administrative level because of their awareness that new arguments raised in court may be procedurally barred

[6]These statistics were obtained from a Freedom of Information Act request, and are data from the 1998 Office of Hearing and Appeals Case Control System

Dubin, 97 Colum L Rev 1289 at 1294-1295

Moreover, it appears that the internal guidelines only protect "unrepresented parties" *See* Commissioner's Brief at 9 Thus, the Commissioner's undocumented internal policies appear to require all representatives (non-attorney and attorney representatives) to raise each and every issue before the Appeals Council to protect their clients' rights to appeal This type of policy will undoubtedly have a chilling effect on representation of claimants by family members, social workers and others and will surely result in more claimants being unrepresented at the Appeals Council levels Many non-attorney representatives are performing a much-needed social service by assisting claimants, who might not otherwise be capable of appealing a decision by themselves, and who would not or could not locate an attorney to file an appeal before the Appeals Council

It is respectfully suggested that the same claimant with the same condition and at the same stage of appeal can have entirely different results depending on which circuit he resides If he resides in a circuit that follows a jurisdictional approach to issue exhaustion in the Social Security context, such as in Sims' Fifth Circuit, he may be forever barred from raising an issue, regardless of whether the Commissioner's undocumented internal policies indicate otherwise If he resides in the Seventh or Eighth Circuits, he will be permitted to raise his concerns, even if they were not raised administratively If he resides in the other circuits that have held that issue exhaustion applies, he will be precluded from raising issues in federal court that were not raised administratively, unless the pertinent court does not consider the issue and the Commissioner does not raise the issue If he resides in a circuit that has not yet made a decision on the issue, such as in the Second Circuit, one cannot even guess at the possible outcome It depends on if the Second Circuit follows the Fifth Circuit's view, the Seventh and Eighth Circuit's view, or the view of the other circuits which have decided in favor of issue exhaustion as a matter of judicial discretion

All these different possible outcomes cannot possibly be appropriate in the administration of a ***national benefits program*** that is otherwise ***heavily regulated by a well-defined regulatory process*** With the advent of the latest Seventh and Eighth Circuit decisions, the national benefit system will necessarily be inequitably administered among the federal circuits Sims respectfully urges this Court to grant her Petition for a *Writ of Certiorari* and resolve the split among the circuits that is, *as a matter of fact*, resulting in differing applications around the country of the same national program

III. THE COMMISSIONER'S UNOFFICIAL PROPOSED MODIFICATION TO THE APPEALS COUNCIL REQUEST FOR REVIEW FORM AND THE ALLEGED UPCOMING ABOLITION OF THE APPEALS COUNCIL WILL NOT ADEQUATELY RESOLVE THE ISSUES PRESENTED HEREIN

In his brief, although the Commissioner argues that the current system is adequate, the Commissioner states that he is considering several changes to ensure uniformity as to the issue before this Court Specifically, the Commissioner announces that the Social Security Administration (hereinafter "SSA") is considering amending the form that "claimants and their representatives must file with the SSA in order for the agency to recognize someone other than the claimant as acting on the claimant's behalf in matters before the agency" Commissioner's Brief at 11, *citing* 20 C F R §404 1707, §410 684, and §416 1507 The Commissioner also acknowledges that the issue presented to this Court may be conclusively resolved by regulation as he has also been informed that the SSA is considering the complete elimination of the Appeals Council in the administrative review process Commissioner's Brief at 13 Based on these two "new developments," the Commissioner argues that this case is not "ripe" for review The Commissioner's proposed modifications do not address the issues raised by this case

First, apart from due process and notice issues, the Commissioner has not pointed to any meaningful rationales for the discretionary application of judicially created issue exhaustion doctrine

in the context of Social Security benefit administration The Commissioner's only precedential support comes from reference to an unpublished United States Magistrate Judge's opinion from the Southern District of New York which suggests, without discussion of the Appeals Council's operating reality, that agency autonomy and expertise, efficient judicial review, and judicial economy are promoted by Appeals Council issue exhaustion Commissioner's Brief at 5 *citing Fernandez v. Apfel*, No 97 Civ 6936, 1998 WL 603151 at *16 (S D N Y Sept 11, 1998) However, the only two circuit courts to analyze the actual operating reality of the Appeals Council have held that issue exhaustion should not apply in the Social Security context as it is inconsistent with the present functioning of the appeals process for such claims *Johnson*, 1999 WL 706635 at *2 ; *Harwood*, 186 F 3d at 1042-1043

In view of the true operating reality of the Appeals Council, issue exhaustion serves no meaningful or legitimate prudential function As explained by Professor Dubin, as of the date of his article (June 1997), the Appeals Council processes over 78,000 cases a year Dubin, 97 Colum L Rev 1289 at 1326 Because of the demands on each Appeals Council member, a typical case receives less than fifteen minutes of paper time The Appeals Council almost never operates as a panel or conducts oral argument *Id.* Most decisions contain boilerplate language and only five percent of the cases reviewed produce changes in results *Id* at 1326-1327

Critically, the Commissioner has not argued that the Appeals Council serves any legitimate role in the appeals process Indeed, the Commissioner admits that the SSA has been considering abolishing the Appeals Council since the mid-1990's Commissioner's Brief at 13 In fact, the Commissioner has been "studying" abolishing the Appeals Council for over ten years As noted by Professor Dubin

> Not surprisingly, a comprehensive study in 1987 of the Appeals Council's operations, commissioned by the Administrative Conference of the United States, and conducted

> by Professors Charles Kock and Davis Koplow, concluded that '[t]he Appeals Council, as it now stands ... is buried in casefiles and unable to marshal its unique expertise or perspective ' Indeed, Professors Koch and Koplow were so impressed by the level of dysfunction at the Appeals Council that they gave serious consideration to its immediate abolition They ultimately recommended the Council's eventual abolition in the absence of successful and fundamental changes in its functioning

Dubin, 97 Colum L Rev 1289 at 1327-1328 (footnotes omitted)

Obviously, the Appeals Council is not serving the desired or anticipated role as originally hoped Under such circumstances, it seems patently unfair to require exhaustion of remedies at the Appeals Council level, when the Appeals Council heretofore has been considered by claimants' representatives throughout the country as nothing but a "weigh station" to federal court

As eloquently stated by Chief Judge Posner in *Johnson*

> The Appeals Council operates more like a complaint bureau than an appellate court, the ***Social Security Administration estimates that it should take only 10 minutes to fill out the form*** 58 Fed Reg 28596 (May 14, 1993)

Johnson, 1999 WL 706635 at *2 (Emphasis added) To prepare an extensive legal brief outlining the various possible errors committed by the ALJ for the purpose of protecting one's rights in federal court clearly envisions more than 10 minutes of work - strongly supporting Chief Judge Posner's ultimate conclusion that the current regulatory state is *inconsistent* with the application of issue exhaustion principles in Social Security cases *See Johnson*, 1999 WL 706635 at *2 The Commissioner never expected or even desired that all issues be raised before the Appeals Council to preserve them in federal court To require such detail based on a judicially created doctrine where the underlying regulatory scheme is not designed to accommodate such a requirement is improper

The Commissioner suggests that modifications to the form that claimants and their representatives must file for the SSA to recognize someone other than the claimant as acting on the claimant's behalf will resolve the issues presented by the lack of notice *See* Commissioner's Brief

at 11, *citing* 20 C F R §404 1707, §410 684, and §416 1507 The Commissioner's analysis is faulty Most importantly, the Commissioner's referenced form *does not even have to be signed by attorneys* to be considered valid *See* 20 C F R §404 1707(b) (1999) (stating that "[a]n attorney does not have to sign a notice of appointment") Indeed, a representative also is not required to use the prescribed form but can file another equivalent written statement *See Program Operations Manual System* § GN 03910 040(B) and § GN 03910 090 (indicating that a notice of appointment can be the Appointment of Representative form or an "equivalent written statement").[7] In other words, the claimant's representative might never even see the "notice language" that the Commissioner alleges he is intending to add to the representative form From a practical perspective, this solution also will not be successful as many copies of the old forms will still be circulating without the required language

The only way to definitively require exhaustion is through regulatory changes which must be recognized by all - not by changes to an internal form sometimes used by some representatives Again, quite interestingly, the Commissioner does not attach copies of the proposed language or any concrete evidence that it is going to implement such a procedure in the first place It is respectfully suggested that changes to standard forms take a long time to implement in the federal government Many different departments must approve modifications such as that proposed by the Commissioner Even if the proposed solution did work, in the interim -- which would likely span a significant length of time -- the national benefits program would not be administered in an equitable or uniform fashion around the country

Furthermore, a mere change in a government form (which will *not* be subject to notice and

[7]The Program Operation Manual System ("POMS") sets forth the Commissioner's internal operating procedures

comment), without a corresponding change in the regulations governing Appeals Council review, will result in further inconsistency and confusion in this national benefit program Once this occurs, the many regulations governing the Appeals Council, including 20 C F R §§ 404 975, 404 976 and 404 900 (1999), will become totally inconsistent with the language on the new "form "[8] Certainly, such a major change in the rights and remedies of disability claimants, from an informal, nonadversarial appeal process, should be accomplished through regulation, with an opportunity for notice and comment, and not by a change in a government form

The Commissioner also argues that the SSA has been considering making changes to the Appeals Council and the administrative appeals process since 1994 Commissioner's Brief at 13 He notes that a study was finally commenced in April 1997 to evaluate the complete elimination of the Appeals Council In fact, it has been well over ten years since SSA first discussed eliminating the Appeals Council, and nothing has changed *See* pages 12-13, *supra*

As recently as last week, Kenneth S Apfel, the Commissioner of Social Security, did not even reference the elimination of the Appeals Council as an issue under consideration by SSA On October 21, 1999, Mr Apfel testified before the Committee on Ways and Means Subcommittees on Social Security and Human Resources regarding the progress that SSA is making to improve its administration of the disability programs[9] He specifically discussed several initiatives which are "designed to improve the disability adjudication progress at all levels of adjudication . . . . " Exhibit A at 2 While Mr Apfel referenced the "elimination of the reconsideration step from the current four-level adjudicative process," he made no reference whatsoever to any plans to eliminate the Appeals Council *Id* at 6-7 Instead, he focused his remarks regarding the Appeals Council to

[8]*See* Sims' Petition for a *Writ of Certiorari* at 10-11 for a discussion of these regulations

[9]A copy of this testimony is attached as Exhibit A

eliminate the "long wait before receiving a decision" from that body

> Later this year, SSA will release its plan to improve service in this area Elements of this plan will include using attorneys from SSA's Office of the General Counsel to assist with case reviews, permitting claimants with cases pending at the Appeals Council to pursue new claims for periods of time subsequent to the ALJ decisions, and promoting stability and excellence on the Appeals Council by continuing SSA's efforts to obtain legislation that would provide pay parity for SSA's Appeals Council Administrative Appeals Judges with non-supervisory ALJs

Id. at 7

A plan which encompasses raising the salaries of the Administrative Appeals Judges is hardly consistent with a purported plan to eliminate that appeal step altogether Thus, the issues raised by Sims' Petition are not moot and are very relevant to the uniform administration of the national Social Security program

To ask the Court to defer certiorari so that the Commissioner can continue to consider doing something it has been thinking about doing for over ten years that may never actually happen makes no sense The Commissioner's solutions are vague and are nowhere near implementation The Commissioner has yet to publish proposed regulations to eliminate the Appeals Council and, as indicated by the Commissioner himself, abolishing the Appeals Council is not a priority at this time Notably, the proposal is not significant enough to be included as one of the agenda items by the Commissioner himself in discussing various initiatives designed to improve the administration of the national Social Security disability program

As previously stated by this Court, Social Security's administrative procedures should be "understandable to the layman claimant" rather than "comfortable only for the trained attorney," and should be "liberal and not strict in tone and operation" *Richardson v. Perales*, 402 U.S. 389, 400-01 (1971) The imposition of issue exhaustion principles in the context of Social Security appeals simply does not make sense in light of the well-accepted informality of such proceedings The

Commissioner's regulations explicitly provide that the Appeals Council will conduct the review process in an informal, nonadversary manner 20 C F R § 404 900(b) (1999) A person is deemed to have completed the steps of administrative review by making a "request" of the Appeals Council and by receiving a final decision by the Appeals Council 20 C F R § 404 900(a) (1999) The standard "Request for Review" form contains three lines of space for claimants to articulate their issues and grounds for appeal The foregoing procedures are inconsistent with the imposition of an issue exhaustion requirement It improperly sends conflicting and misleading signals to the claimants, many of whom have mental disabilities and/or limited educational abilities

In addition, Sims notes that even if the notice requirement was met by modifying the appeal form, due process also requires a meaningful opportunity to be heard *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950) At present, due to the informal proceedings during the pendency of a Social Security claim, a claimant has no real opportunity to raise, develop, and preserve issues at the hearing so they may be asserted on appeal to the Appeals Council Dubin, 97 Colum L. Rev. 1289 at 1336-1337. The claimant also has no ability to raise, assert and have these issues properly developed, heard and considered at the Appeals Council *Id* Were due process procedures to be enacted to accommodate issue exhaustion requirements, a significant change in the SSA's philosophy would be necessary

While there is no dispute that the imposition of an issue exhaustion requirement *could be legislated by the Congress and implemented by the SSA*, ***to date, this has not occurred***, and indeed, is inconsistent with the currently informal nonadversarial Social Security administrative appeal process The Fifth Circuit overstepped its boundaries when it decided to apply issue exhaustion principles to Sims' case Not only did it fail to consider Congressional intent and the plain statutory and regulatory language governing the administrative appeal of Social Security cases, but it also

substituted its own judgment for that of Congress and the SSA, as evidenced by the applicable legislation and regulations Sims respectfully requests that this Court grant her petition for a *writ of certiorari* to allow her the opportunity to fully brief the appropriateness of the issue exhaustion doctrine in the context of Social Security proceedings

CONCLUSION

The Commissioner has not argued, as he could not argue, that the issue exhaustion doctrine is equitably applied across the country As a result of the inequality of applying differing policies in a national benefit program, Sims respectfully prays that this Court issue a *writ of certiorari* to review the OPINION of the United States Court of Appeals for the Fifth Circuit

Respectfully submitted,

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For Release on Delivery

DISABILITY OVERSIGHT

COMMITTEE ON WAYS AND MEANS
SUBCOMMITTEES ON
SOCIAL SECURITY AND HUMAN RESOURCES

October 21, 1999

STATEMENT BY
KENNETH S. APFEL

SOCIAL SECURITY ADMINISTRATION

EXHIBIT A

Chairman Shaw, Chairman Johnson, Mr. Matsui, Mr. Cardin and Members of the Subcommittees:

I am pleased to be here today to discuss the progress that SSA is making to improve its administration of the disability programs. This opportunity to report on SSA's disability programs is especially relevant since October has been designated by the Congress and the President as "National Disability Employment Awareness Month."

Overall, I am happy to report that SSA has made substantial progress towards improving the service it provides to individuals with disabilities. SSA is pleased with its progress in this direction, but recognizes that more needs to be done to ensure that these vitally important programs offer the protection that they were intended to provide to the American people.

While much of the public debate about Social Security focuses on retirement, this is also a particularly appropriate time to emphasize that about one third of Social Security beneficiaries are severely disabled workers, their children, or the surviving family members of workers who have died. Because about 25 to 30 percent of today's 20 year olds are estimated to become disabled before retirement, the protection provided by the Social Security Disability Insurance (SSDI) program is extremely important, especially for young families. For a young, married, average income worker with two children, Social Security is the equivalent of a $233,000 disability income insurance policy. In the event of severe disability, the SSDI program stands between these families and poverty. Additionally, the Supplemental Security Income Program (SSI) serves the most economically vulnerable population with disabilities, most of whom are living in poverty.

In December 1990, 5.7 million individuals with disabilities were receiving either Social Security or SSI disability benefits. As of December 1998, 9.0 million were receiving Social Security or SSI disability benefits. As you are no doubt aware, managing such an enormous complex program presents many challenges. One way to put our disability programs in perspective is to compare them with the recent experience in other developed countries.

Comparisons aren't always simple. SSA's programs have always awarded benefits on the basis of a single strict standard of disability defined by statute. Other nations have sometimes used broader standards to make it easier for persons nearing retirement or experiencing long-term unemployment to collect disability benefits. In addition, benefits are often provided to working-age adults without any disability requirement. In tandem with these broader standards, several countries have made quite strenuous efforts to encourage hiring the disabled and enabling them to go to work.

In spite of the considerable program growth of the early 1990's, SSA's disability rolls are not high in most comparisons to other western countries. For example, in the United States, at the end of 1998, 3.5% of the population insured under Social Security were receiving disability benefits from the SSDI program. This is slightly lower than rates in Germany, the United Kingdom, and Austria, and much lower than in the Netherlands, Sweden, or Norway.

Actuarial forecasts indicate that the number of people on SSA's disability rolls will continue to grow. The rate of disability prevalence is projected to increase from 3.5 % to almost 5% over the next 10 years. Although still a very small percent of the population, this represents an increase of almost 40 percent. This increase will occur largely due to the aging of the population and within the context of our very strict definition of disability.

The current growth in the disability programs has resulted in organizational stress as SSA's dedicated and capable employees have worked to maintain their traditional high level of customer service. Additionally, the resultant workload has made it even more critical that we seek ways to ensure that eligible individuals are identified as early in the process as possible.

In 1994, SSA announced an ambitious plan to streamline the disability process by eliminating unnecessary handoffs and most importantly to ensure that eligible individuals are identified as early in the process as possible. In the years following, SSA carefully tested many aspects of this plan. This testing was critical in order to make certain that our most vulnerable customers were not adversely affected by any changes.

In August 1998, the Social Security Advisory Board issued its report, "How SSA's Disability Programs Can Be Improved." In this report, the Advisory Board made a number of recommendations relating to SSA's disability programs. These recommendations included making the disability determination process more consistent and equitable, strengthening the public's trust in the integrity of the programs, and helping disabled individuals continue or return to work. As a result of SSA's prior initiative to strengthen the disability programs, SSA was already well on the way to addressing these concerns.

Disability Management Plan

SSA is now working on several initiatives designed to improve the disability adjudication process at all levels of adjudication, safeguard the integrity of the program, and enhance beneficiaries' opportunities to work.

Many of these initiatives are based on SSA's Disability Redesign Plan. After a lengthy study of the issues involved, I determined that no single initiative would be the answer. SSA needed to take concerted action in several areas. SSA needed to address longstanding issues to improve administrative efficiency and achieve greater consistency in our decisionmaking process.

In March of this year, SSA published the report, *Social Security and Supplemental Security Income Disability Programs: Managing for Today, Planning for Tomorrow*, and in August of this year, SSA published the report, *The Hearings Process Improvement Initiative: Delivering Better Service for the 21st Century*. These reports set out our comprehensive strategy and firm commitment to administer the disability programs fairly, effectively, and efficiently, so that SSA can continue to protect the millions of individuals who depend on it. To achieve this, SSA is making

improvements to both the initial disability determination process and the hearing process. The improvements are premised on SSA's strong belief that, through investments in the quality of our decisionmaking at the initial level of the administrative process, such as making the claim development process more comprehensive, SSA can expect to provide better service by ensuring that eligible individuals with disabilities are identified as early in the process as possible. Denied claimants who appeal will experience a more efficient appeals process that will take less time to produce decisions.

SSA recognizes that many of the benefits expected from these improvements will not materialize immediately. While SSA expects some short term decreases in productivity during implementation, the long term improvements to the system will outweigh these costs.

BACKGROUND

Before I get into specifics, a brief overview of the current disability process might help put this statement in context. The Social Security Act broadly defines disability as the inability to engage in any substantial gainful activity due to a physical or mental impairment expected to last at least one year or result in death. The Act requires the Commissioner of Social Security to prescribe rules for obtaining and evaluating evidence and making disability decisions. The law further requires that initial disability determinations be made by State Disability Determination Services (DDSs) following Federal rules and guidelines and financed by Federal funds.

State DDS Process

In the State DDS, a team composed of a disability examiner and a physician (or sometimes a psychologist) makes the disability determination based on an evidentiary record. The State DDS requests medical evidence from the treating physician(s) and other sources identified by the claimant. If that evidence is incomplete or conflicting, the disability examiner may request a consultative examination from the claimant's treating physician or a physician under contract to the DDS to perform these examinations. If necessary, the examiner will also obtain evidence from the claimant's family, friends, or other third parties that will help explain how the individual's impairment(s) affects his or her ability to work. The team then considers all medical and other evidence to make the disability determination.

Appeals Process

A person who is dissatisfied with an initial determination, may pursue an appeal through three administrative levels and the Federal courts. The Act requires the Commissioner to provide a claimant the opportunity for a hearing, and allows for filing of a civil action in Federal court after the Commissioner's final decision. SSA's regulations also provide a reconsideration review prior to the hearing before the administrative law judge (ALJ) and an opportunity for final review by SSA's Appeals Council.

Reconsideration is the first administrative review for claimants and involves a *de novo*, or fresh, review of the claim (including any new evidence) by individuals who did not participate in the original determination. The reviewers consider all of the evidence and issue a reconsideration determination.

The second level of administrative appeal is a *de novo* hearing before an ALJ who can call on medical or vocational experts, if needed, to help evaluate the evidence. Usually the claimant obtains legal representation at this point. Frequently, new evidence is introduced by the claimant and his or her representative, often at the hearing itself. Claimants are allowed to appear before the ALJ and to call witnesses.

The final administrative appeal level is the Appeals Council which may grant, deny, or dismiss a request for review of the ALJ decision. It will grant review if the ALJ decision contains an error of law, is not supported by substantial evidence, involves a broad policy issue, or if there appears to be an abuse of discretion by the ALJ. After an Appeals Council action, if the claimant is still dissatisfied, the next step is filing a civil action in Federal court.

Improving the Disability Adjudication Process

Results from redesign testing showed that certain process changes resulted in:

- A higher percentage of individuals being allowed at the initial level;
- Enhanced quality of initial decisions;
- Earlier access to the hearing process for those who appeal their initial decision; and
- High claimant satisfaction.

In addition to the information already gathered, SSA remains committed to testing the Disability Claims Manager concept as an alternative approach to claims taking. The results of this testing will allow SSA to determine if the process can provide a more user-friendly, efficient and faster way to serve claimants filing for disability benefits.

On October 1st SSA implemented prototypes in 10 states, which combine these features of redesign with other initiatives to improve the adjudicative process at all levels. These prototypes consist of the following:

- Enhanced documentation and explanations of decisions at the initial claims level;
- Revised roles of the disability examiner and medical consultant in State DDS determinations;

- An opportunity for a conference between the claimant and the State DDS decisionmaker; and

- Elimination of the reconsideration step of the administrative appeals process.

In our recent travels, Dr. Daniels and I saw first hand the commitment that SSA and DDS employees have to making the new process work. One SSA Office of Hearings and Appeals (OHA) employee succinctly pointed out that better documented and rationalized DDS determinations would make OHA's job harder because the planned initiatives ensure that only the most complex cases will get to OHA. Additionally, the new mantra for the New York DDS units participating in the prototype testing is "No easy cases to OHA."

Claims at the Initial Level

SSA is committed to enhancing the quality of decisions by ensuring that SSA policies are applied in a consistent manner by all adjudicators and by improving the development and explanations of disability determinations.

SSA's redesign experience showed that by focusing more attention at the initial determination level, SSA could expect to improve quality and identify eligible individuals earlier in the process.

Revising the Roles of the Disability Examiner and Medical Consultant

The process being tested in the prototype states enhances the existing roles of the disability examiner/medical consultant team and is derived from previous redesign tests. It permits the DDS disability examiner to make the initial determination of disability without requiring the certification of a medical consultant on the disability forms. The medical consultants will act as true consultants and generally will only be asked to review the more complex cases in which expert medical guidance is needed. Medical consultant review will, as required by law, continue to be required for all SSI childhood claims and in denials in which the evidence indicates the existence of a mental impairment.

Providing a Claimant Conference

The purpose of the claimant conference is to provide the claimant with an increased opportunity to interact with the disability decisionmaker earlier in the process and to submit further information when evidence in the initial claim is insufficient to make a fully favorable determination. Before issuing a less than fully favorable determination at the initial level, the DDS decisionmaker will contact the claimant to discuss the case. This ensures that claimants can fully present their case and allows them to have a better understanding of how their cases were decided. This initiative serves SSA's goals of improving customer service by making the process more personal and allowing appropriate claims earlier in the process.

Thorough case development and explanation practices at the initial claims level are crucial to achieving accurate decisionmaking. SSA recognizes that assuring more complete development and improved explanations of how the determination was made will require more time to be initially spent on each individual case. However, enhanced claims documentation is essential to furthering the overarching goals of improving the quality of decisions and making the correct decision early in the process. This will ultimately save time for many beneficiaries who will, as a result of these enhancements, be awarded benefits earlier in the process.

Eliminating Reconsideration

Eliminating the reconsideration step from the current four-level adjudicative process addresses SSA's goal for a streamlined, more efficient process. The improvements to the initial determination process will afford the same benefits without an additional administrative step.

Improving the ALJ Hearing Process

During the past few years, SSA undertook a number of initiatives to address large hearing workloads that have produced real results. Initiatives such as the establishment of case screening units and specialized decision writing units, helped decrease average processing time at the hearing level from 386 days in 1997 to, under a preliminary analysis, 316 days at the close of FY 1999. Despite these improvements, SSA knew that it had to do better.

Therefore, SSA convened a high-level interdisciplinary team under the direction and guidance of the Regional Chief Administrative Law Judges. The team also worked with an outside contractor (Booz-Allen & Hamilton, Inc.). The team was charged with making recommendations that would build on the recent improvements in OHA quality and timeliness and further reduce processing times, increase productivity, and enhance the quality of service to the claimant. In August of this year, SSA published the team's recommendations in *The Hearings Process Improvement Initiative: Delivering Better Service for the 21st Century*. As stated in the report, it is our intent that, when fully implemented, the Hearings Process Improvement initiative (HPI) will reduce processing times. Average processing times for all hearing cases are projected to fall from an estimated 316 days in FY 1999 to 257 days by the end of FY 2000, and 193 days in FY 2002.

The improvements envisioned by HPI differ from the more traditional response of committing additional resources to the existing hearing process that SSA has taken over the last few years. Instead, the plan relies on process changes, including new administrative processes for local hearing offices to achieve dramatic improvements. On this point, I want to make clear that there are no plans to alter the organizational structure of the Office of the Chief ALJ.

Specific HPI initiatives include implementation of a "National Workflow Model" that combines pre-hearing activities, a standardized pre-hearing conference, and processing-time benchmarks for various tasks. These activities will increase the "front-end"

efficiency of our hearing process and get the cases to our administrative law judges sooner for decisionmaking.

With the plan set out in the report, the Social Security Administration continues its commitment to a customer-focused hearings process that is more timely and efficient while maintaining the claimant's right to a fair and impartial hearing. We will begin implementing this plan in January 2000 and expect to have the project fully implemented by March 2001.

Improving the Appeals Council Process

Having reached decisions on making improvements to the initial and hearing levels, SSA is now carefully looking into what can be done to eliminate the long wait before receiving a decision from SSA's Appeals Council. Later this year, SSA will release its plan to improve service in this area. Elements of this plan will include using attorneys from SSA's Office of the General Counsel to assist with case reviews, permitting claimants with cases pending at the Appeals Council to pursue new claims for periods of time subsequent to the ALJ decisions, and promoting stability and excellence on the Appeals Council by continuing SSA's efforts to obtain legislation that would provide pay parity for SSA's Appeals Council Administrative Appeals Judges with non-supervisory ALJs. Quite simply, forcing individuals to wait more than a year for an Appeals Council decision is unacceptable.

Safeguarding the Integrity of the Program

As I stated at the outset SSA is committed to ensuring that only those who are truly disabled continue to receive benefits. Thanks to additional funding from Congress, and particularly this committee, SSA is doing more continuing disability reviews (CDRs) than ever. In fiscal year 1998, SSA processed almost 1.4 million periodic CDRs, more than twice the number of CDRs processed in 1996. Based on the CDRs done in FY 1998, SSA estimates that 70,300 beneficiaries will have their benefits terminated after all appeals, resulting in savings of approximately $4.4 billion when you consider the savings to the OASDI, SSI, Medicare, and Medicaid programs for the ten-year period running from 1998 to 2007. And while the numbers for FY 1999 are still preliminary, our initial data indicates that we will exceed the number of CDRs that we processed in FY 1998 by at least 10 percent.

Importantly, SSA is meeting the goals set in our 7-plan that SSA has shared with you. As you may recall, this plan calls for approximately 9.3 million CDRs to be conducted during the 7-year period, FY 1996 through FY 2002. SSA is on schedule to meet our goal of being up-to-date on all Title II CDRs by 2000, and all Title XVI CDRs by 2002. With your continued support, SSA will stay on top of this important workload.

Enhancing Beneficiaries Opportunities To Work

Before I close, I applaud this committee's work on the return to work legislation and want to reiterate the Administration's longstanding commitment to encouraging individuals with disabilities to return to work. This year, SSA promulgated regulations

to increase the level of earnings at which SSA presumes that a non-blind individual is performing substantial gainful activity from $500 to $700. This is just one in a number of initiatives that will be taken to help individuals with disabilities enter the workforce.

SSA's emphasis on returning individuals with disabilities to work is starting to pay off. Since FY 1996, the number of beneficiaries for which SSA reimbursed state vocational rehabilitation agencies for successfully returning beneficiaries to work has almost doubled from 6,024 in 1996 to 11,124 in FY 1999. Also, our latest data show that there were approximately 16,650 working SSDI beneficiaries at the start of FY 1998 and 23,300 working SSI recipients as of June 1999. SSA will continue to do all that it can to help individuals with disabilities return to work.

In addition to the initiatives that SSA can undertake using its current statutory authority, the Administration looks forward to working with Congress to enact the Work Incentives Improvement Act. I understand that there are financing and health- and education-related policy issues that remain to be addressed.

This important legislation improves access to health care for the disabled, establishes a program that allows consumers their choice of private or public employment service providers, creates work incentive outreach programs, and reauthorizes SSA's demonstration authority to test new and innovative ways to return people to work.

CONCLUSION

Thank you for the opportunity to be here today. SSA is committed to making the Social Security disability programs both more responsive to its claimants and beneficiaries and more accountable to the nation's taxpayers. We will tirelessly continue in our efforts to make Social Security's disability programs the best that they can be. I would be happy to answer any questions.

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No. 98-9537

In the

Supreme Court of the United States

JUATASSA SIMS,

Petitioner,

vs.

KENNETH S. APFEL,
Commissioner of Social Security,

Respondent.

On Petition for a Writ of Certiorari

To the United States Court of Appeals

For the Fifth Circuit

SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

Pursuant to Rule 15(8) of the Rules of the United States Supreme Court, Petitioner, Juatassa Sims, files this Supplemental Brief in support of her Petition for a *Writ of Certiorari* to inform the Court of two newly issued circuit court decisions, designated for publication, that directly bear on the issues now pending before this Court. Within the last few weeks, the Seventh and the Eighth Circuits have issued decisions which oppose the application of administrative waiver to bar issues raised by claimants in federal court that were not specifically raised before the Appeals Council. *See Harwood v. Apfel*, No. 98-2700, __ F.3d __, 1999 WL 608649 (8th Cir. Aug. 13, 1999) and *Johnson v. Apfel*, No. 98-4284, __ F.3d __, 1999 WL 675368 (7th Cir. Aug. 30, 1999).[1] Both of these decisions directly conflict with the Fifth Circuit's holding in *Sims*. *See* Appendix[2] at 1-2.

As noted in the Petition for a *Writ of Certiorari* (hereinafter "Petition") previously filed herein in this case, in *Darby v. Cisneros*, 113 S.Ct. 2539 (1993), this Court held that courts should not impose on litigants any administrative exhaustion steps that the agency itself does not require. *See* Petition at 7, 9. As noted in the Petition, the Social Security Administration requires a final exhaustion step to its Appeals Council for aggrieved claimants, but does not require claimants to submit arguments during this informal, non-adversary step. *Id.* at 10-11. In her Petition, Sims asked this Court to consider whether the Fifth Circuit erred in imposing a judicially created "issue exhaustion" requirement in federal court to bar her from raising any arguments that she did not raise before the Appeals Council. *Id.* at 1.

Sims argued that her case presented an important federal question of administrative law for

---

[1]Copies of the *Harwood* and *Johnson* decisions are attached as Exhibits A and B, respectively.

[2]The Appendix was attached to Sims' Petition for a *Writ of Certiorari*, filed herein.

which there were compelling reasons for this Court is issue a *writ of certiorari* to review the Fifth Circuit's decision in *Sims*. *Id.* at 7. Relying on Supreme Court Rule 10(c), Sims argued that the Fifth Circuit failed to follow U.S. Supreme Court precedent and violated her due process rights by enforcing administrative issue exhaustion on jurisdictional grounds despite the lack of notice by the Commissioner. *Id.* at 6-16.

In light of the recent *Harwood* and *Johnson* decisions, there is now a definite conflict among the federal circuits on the appropriateness of applying administrative issue exhaustion principles in Social Security cases. The conflict creates yet another basis for seeking a *writ of certiorari* from this Court. *See* Sup. Ct. R. 10(a). The circuit law throughout the country is presently divided on whether a Social Security claimant is barred from raising issues in federal court that the claimant did not raise before the Appeals Council. *Compare Harwood* and *Johnson* with *Paul v. Shalala*, 29 F.3d 208, 210 (5th Cir. 1994).

In rejecting the application of administrative issue exhaustion principles to Social Security cases, in *Johnson* and *Harwood*, the Seventh and Eighth Circuits heavily relied upon the lack of any agency regulation requiring administrative issue exhaustion. *Harwood* at *2; *Johnson* at *2. Both courts focused upon the appropriateness of the imposition of a judicially-created issue exhaustion requirement in the Social Security context and commented upon the lack of consistency on the part of the Commissioner as to the application of the doctrine. *Id.*

Both courts further noted that the "three lines" contained on the Social Security Administration's form for seeking Appeals Council review (the HA-520) hardly provide support for any argument that the agency itself requires issue exhaustion at that level of appeal. *Id.* The Seventh and Eighth Circuits considered the nonadversarial process required for the effective administration of the Social Security benefit program and decided that issue exhaustion did not make sense as the

program is presently administered. The courts also pointed to the lack of any notice to the claimants from the Commissioner that issues not raised to the Appeals Council were waived if later raised in federal court. *Id.*

The Seventh and Eighth Circuit decisions in *Harwood* and *Johnson* directly conflict with the Fifth Circuit's decision in *Sims*. In *Sims*, the Fifth Circuit held that it did not have ***jurisdiction*** to consider her arguments because they were not raised before the Appeals Council. Appendix at 1-2. The *Sims* Court relied upon prior Fifth Circuit precedent, *Paul v. Shalala*, 29 F.3d at 210, that created a jurisdictional bar precluding the claimant from raising issues in federal court that were not specifically raised before the Appeals Council. *Id.*

The division among the circuits as to the appropriateness of administrative issue exhaustion in Social Security cases will necessarily result in inequities among claimants. On the same procedural facts, two claimants with identical cases will be treated differently depending upon which jurisdiction they reside. One claimant will be permitted to raise arguments not raised administratively and succeed in federal court and potentially obtain benefits. On the same facts, in another jurisdiction, another claimant will be booted out of court and never receive benefits. Such scenarios will become common-place unless this Court addresses the issue to ensure uniformity.

Moreover, even as the law existed prior to the publication of the *Harwood* and *Johnson* cases, the General Counsel of the Social Security Administration, Arthur J. Fried, already admitted that the agency did not raise administrative issue exhaustion principles uniformly in all cases.[2] Specifically, Mr. Fried stated:

> This court-fashioned rule, which has been variously termed "administrative waiver" and "issue exhaustion," is designed to enable the administrative process to function on a more informed basis, to the benefit of disability claimants as well as Agency adjudicators, and to obviate the need for court involvement in certain cases by timely alerting the Agency to the need for corrective action prior to the commencement of litigation . . . .
>
> While we believe that the administrative waiver rule helps to promote better service to disability claimants, we also note that the defensive utilization of the administrative waiver rule, must, at times, be limited to avoid possible injustice. Accordingly, [Office of General Counsel] litigators do not cite the rule in cases where plaintiffs are unrepresented at the administrative level; do not rely exclusively on the rule, without a substantive response to the particular challenges asserted by the plaintiffs; and do not consider the rule in making pre-briefing defensibility determinations.

Mr. Fried has further admitted that administrative issue exhaustion is a judicially created doctrine, and thus not one supported by regulations, consistent with the decisions of *Harwood* and *Johnson*.

Due to the lack of uniformity among the circuits, and even within the Social Security Administration, as to the application of administrative issue exhaustion principles in Social Security cases, Sims respectfully urges this Court to issue a *writ of certiorari* to review the Opinion of the United States Court of Appeals for the Fifth Circuit.

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[2] A copy of a letter from Arthur Fried, General Counsel of the Social Security Administration, dated July 15, 1999, is attached as Exhibit C.

Patrick HARWOOD, Plaintiff--Appellant,
v.
Kenneth S. APFEL, Commissioner, Social Security Administration, Defendant--Appellee.

No. 98-2700.

United States Court of Appeals,
Eighth Circuit.

Submitted: May 12, 1999.

Filed: Aug. 13, 1999.

Appeal from the United States District Court for the District of South Dakota.

Before RICHARD S. ARNOLD, JOHN R. GIBSON, and BOWMAN, Circuit Judges.

GIBSON, Circuit J.

*1 Patrick Harwood appeals the judgment of the district court, [FN1] which affirmed the denial of his application for social security disability benefits. The Social Security Administration denied Harwood's initial application, and an Administrative Law Judge denied benefits after a hearing. The Appeals Council denied Harwood's request for further review, and the ALJ's decision became the final decision of the Commissioner. Harwood argues that the ALJ failed to fully and fairly develop the record, that the ALJ's decision ignores Harwood's limited intellectual abilities, and that the decision is otherwise not supported by substantial evidence. The district court held that Harwood waived the first two arguments because he failed to include them in his brief to the Appeals Council, and it rejected the third argument on its merits, holding that substantial evidence supported the ALJ's rejection of Harwood's subjective complaints of disabling pain. We affirm the judgment of the district court because we reject Harwood's arguments on their merits.

Harwood is forty-three years old, has a tenth-grade education, and formerly worked as a jewelry manufacturer and cleaner. He stopped working in September 1994 because he experienced pain throughout his shoulders, elbows, wrists, and hands. He applied for disability benefits on April 12, 1995, and the ALJ denied benefits in September 1996 after a hearing. The ALJ analyzed Harwood's claim through the familiar five-step process set out by the Social Security Regulations. See 20 C.F.R. § 404.1520(a)-(f) (1999); McCoy v. Schweiker, 683 F.2d 1138, 1141-42 (8th Cir.1982). Harwood showed that he was unable to return to his previous employment, and at the fifth step of the process, the ALJ determined that Harwood could perform various jobs that exist in the national economy even though he could not work as a manufacturer and cleaner of jewelry. If Harwood can perform such jobs in the national economy, he is not "disabled" within the meaning of the Social Security Act. See Weiler v. Apfel, ___ F.3d ___, No. 98-1480, 1999 WL 404691, at *1 (8th Cir. June 21, 1999).

The ALJ's conclusion was predicated upon a hypothetical question that he posed to a vocational expert. Harwood's treating physician concluded that Harwood could perform "light" work with "no repetitive upper extremity activities," provided that he receive the "opportunity for mini rest breaks for his upper extremities and to rotate activities." The ALJ asked whether an individual with Harwood's skills, work experience and physical limitations could find any unskilled jobs in the national economy. The vocational expert responded that an individual fitting the ALJ's description could find work as a parking enforcement officer, a parking lot attendant, a house-sitter, or a driver. Based largely upon this evidence, the ALJ concluded that Harwood was not entitled to disability benefits.

We must uphold the ALJ's decision if it is supported by substantial evidence. See Metz v. Shalala, 49 F.3d 374, 376 (8th Cir.1995). Our task is not to reweigh the evidence, and we may not reverse the Commissioner's decision merely because substantial evidence would have supported an opposite conclusion or merely because we would have decided the case differently. See Woolf v. Shalala, 3 F.3d 1210, 1213 (8th Cir.1993); Smith v. Shalala, 987 F.2d 1371, 1374 (8th Cir.1993). In determining whether substantial evidence supports the ALJ's decision, we must consider evidence in the record that supports the ALJ's decision as well as evidence that detracts from it. See Brockman v. Sullivan, 987 F.2d 1344, 1346 (8th Cir.1993).

*2 At the outset, we reject the Commissioner's argument that Harwood forfeited two of the three issues he now raises by failing to raise them before the Appeals Council. Although a party seeking judicial review of an agency action must generally exhaust available agency remedies and may not

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EXHIBIT A

generally proceed upon an argument not made to the agency, see McCarthy v. Madigan, 503 U.S. 140, 144-45 (1992), the general rule makes little sense in this particular context. Several considerations compel the conclusion that Harwood has not waived the arguments that he did not specifically address to the Appeals Council.

First, the Commissioner urges us to adopt a waiver rule that the agency does not itself enforce. The Appeals Council routinely considers arguments not specifically raised by claimants before it--a product of its duty to review an ALJ's decision "in an informal, nonadversary (sic) manner" and a fitting analogue to the ALJ's well-established duty to develop a full and fair record (even when, as here, claimants are represented by counsel). See 20 C.F . R. §§ 404.900(b), 416.1400(b) (1999); Jon C. Dubin, Torquemada Meets Kafka: The Misapplication of the Issue Exhaustion Doctrine to Inquisitorial Administrative Proceedings, 97 Colum. L.Rev. 1289, 1325-26 and n. 179 (1997); Wilcutts v. Apfel, 143 F.3d 1134, 1137-38 (8th Cir.1998) (stating that Commissioner has duty to develop record because hearing is non-adversarial; "The goals of the Secretary and the advocates should be the same: that deserving claimants who apply for benefits receive justice.") (quotation omitted).

Second and relatedly, the Appeals Council's non-adversarial proceedings give claimants like Harwood no advance notice that issues not specifically raised will be forfeited. The Commissioner's own regulations establish a one-page form, the HA-520, through which claimants who lose before the ALJ may request review by the Appeals Council. See 20 C.F.R. § 422.205(a) (1999). The form provides a three-line space for claimants to articulate the grounds for appeal--and no warning of the waiver rule that the Commissioner now urges. See Dubin, supra, at 1305, 1332. Indeed, Harwood himself received no notice of such a waiver rule. The ALJ's written decision denying benefits stated that the Appeals Council "may review your case for any reason." Further, the decision warned Harwood that he could not obtain judicial review unless he first sought review by the Appeals Council, or unless the Council reviewed the ALJ's decision on its own motion. Nowhere did it state that Harwood would forfeit issues not raised to the Council, and the ALJ's reassurance that the Council "may review your case for any reason" misleadingly implies otherwise. In effect, the Commissioner urges us to deny judicial review to those claimants who have relied upon the agency's own professed duty to proceed in an "informal, nonadversary manner." We decline to do so.

*3 Third, we are not persuaded by the cases cited in support of the Commissioner's position. As an initial matter, most of them involve issues that claimants failed to raise not only before the ALJ and the Appeals Council, but before the district court as well. See Weikert v. Sullivan, 977 F.2d 1249, 1254 (8th Cir.1992); Johnson v. Chater, 108 F.3d 942, 945-46 (8th Cir.1997). [FN2] Obviously, there are reasons why we, an adversarial forum, choose not to review issues that parties do not raise to the district court, another adversarial forum, that have little bearing on whether a federal court should consider an issue not raised before the Social Security Appeals Council. Weikert and Johnson do not establish that one's failure to present an argument to the Appeals Council, without more, creates an insuperable bar to judicial review, and we believe the Commissioner reads them too broadly. Furthermore, Weikert and Johnson are otherwise readily distinguishable. Weikert involved a claimant's failure to preserve the argument that the ALJ "displayed such hostility to Weikert that [the ALJ's behavior] deprived Weikert of his right to an impartial hearing." 977 F.2d at 1254. We declined to address the argument, for Weikert not only failed to present it to the district court, but failed to follow a specific procedure outlined by the agency for disqualifying an ALJ for prejudice. See id. There is no such analogous procedure involved in this case. Johnson, moreover, primarily concerns the inability of a claimant to present new evidence to the district court through a motion to alter or amend the district court's judgment under Fed.R.Civ.P. 59(e), after having failed to do so at the first opportunity. See 108 F .3d at 945-46. We believe that Johnson 's holding simply reflects Rule 59(e)'s limited purpose, and that it does not control the present case. Finally, the Commissioner directs our attention to numerous cases from other circuits. We find these cases either inapposite [FN3] or unpersuasive, [FN4] in light of the above discussion.

Addressing the merits of Harwood's claims, we first reject his argument that the ALJ did not fully and fairly develop the record. The ALJ's hypothetical question to the vocational expert included the findings of Harwood's treating physician, who concluded that Harwood could perform "light" work with "no repetitive upper extremity activities" if he received the "opportunity

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for mini rest breaks for his upper extremities and to rotate activities." The vocational expert testified that an individual with Harwood's skills, work experience, and physical limitations could work as a parking enforcement officer, a parking lot attendant, a house-sitter, or a driver. Harwood argues that the terms "repetitive" and "mini rest breaks" are ambiguous and that the ALJ should have clarified their meaning by posing interrogatories to Harwood's treating physician. In particular, Harwood argues that "repetitive" could, on one hand, describe a job involving the same motion throughout the day, or, on the other, a job involving the same motion performed for discrete periods of time during the day. Further, he argues, the phrase "mini rest breaks" does not specify the frequency or duration of the breaks that Harwood needs. We are unpersuaded. The vocational expert stated that none of the jobs that Harwood could perform "are in any sense repetitive," and the hypothetical question described one's need for "normal breaks" during the working day. "A proper hypothetical question presents to the vocational expert a set of limitations that mirror those of the claimant." Hutton v. Apfel, 175 F.3d 651, 656 (8th Cir.1999). Id. (quotation omitted). The hypothetical posed to the vocational expert could have been more precise, but we believe that it adequately described Harwood's limitations.

*4 Harwood next argues that the ALJ's finding ignores various intellectual deficiencies discovered during a vocational assessment in July 1995--three months after Harwood applied for benefits. We reject this argument. First, Harwood misreads the record. The ALJ did not ignore the assessment, but rather declined to give it "any significant probative weight." Second, the ALJ's decision to discount the assessment was entirely reasonable. The assessment conflicted with those of Harwood's treating and examining physicians, and it primarily concerned various transferable skills without assessing any unskilled work that Harwood might be capable of performing (such as that described by the vocational expert). Further, Harwood's previous success as a cleaner and manufacturer of jewelry before the onset of his pain belies his claim that he lacks the intellectual capacity to perform the unskilled jobs described by the vocational expert. Although one's physical ability to perform a job does not necessarily imply that he or she "has the mathematical, reasoning, or language skills to perform the duties [of the job] on a full-time basis in a sometimes competitive and stressful environment in the working world," Titus v. Callahan, 133 F.3d 561, 562 (8th Cir.1997), we believe that the ALJ did not err by assigning little probative weight to Harwood's alleged intellectual deficiencies.

Finally, Harwood attacks the ALJ's rejection of Harwood's subjective complaints of disabling pain. "[T]he ALJ must ... set forth the inconsistencies in the record that lead him to reject the claimant's complaints." Jeffery v. Sec. of Health & Human Servs., 849 F.2d 1129, 1132 (8th Cir.1988). "In order to properly evaluate a claimant's subjective complaints of pain, the ALJ is required to make a credibility determination by taking into account the following factors: (1) the claimant's daily activities; (2) the duration, frequency, and intensity of the pain; (3) the dosage, effectiveness, and side effects of medication; (4) precipitating and aggravating factors; and (5) functional restrictions." Hutton v. Apfel, 175 F.3d 651, 654-55 (8th Cir.1999) (citing Polaski v. Heckler, 739 F.2d 1320, 1322 (8th Cir.1984)).

Under these standards, we conclude that substantial evidence supports the ALJ's credibility determination. Harwood's treating physician performed a functional capacity assessment and determined that Harwood was capable of light work that did not involve repetitive upper extremity motions. An orthopedic surgeon, in turn, found that Harwood's upper extremity area was essentially normal with no localized tenderness or swelling, and determined that Harwood was capable of "light duty work" and should seek retraining for new job skills. Harwood told his physical therapist that he had only intermittent pain while working and no pain at rest or at night, and a physician who examined Harwood at the request of his workers' compensation carrier turned down Harwood's request for a slip stating that he could not work because the physician "really didn't think he was totally disabled from doing any type of job." At one point, Harwood was discharged from physical therapy for failing to reschedule missed appointments. See Thomas v. Sullivan, 928 F.2d 255, 259-60 (8th Cir.1991) (failure to follow prescribed treatment is relevant to substantial evidence analysis). Harwood's day-to-day activities further supported the ALJ's credibility determination. The record showed that Harwood could care for his two-year-old child while his wife worked; that he could perform light housekeeping chores such as the laundry as well as "light house cleaning and odd jobs around the house [for] 1 to 2 hours[,] four days a week;" and that he could draw cartoons for at least one hour at a time, three times a

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week. Although Harwood presented contrary evidence to support his claim, we conclude that the record amply supports the ALJ's credibility finding.

*5 For the foregoing reasons, the judgment of the district court is affirmed.

FN1. The Honorable Richard H. Battey, United States District Judge for the District of South Dakota.

FN2. See also Riggins v. Apfel, 177 F.3d 689, 693 (8th Cir.1999) (same). Riggins was issued after oral argument in the present case.

FN3. The first of these, James v. Chater, 96 F.3d 1341, 1344 (10th Cir.1996), is inapplicable on its face: "[I]ssues not brought to the attention of the Appeals Council on administrative review may, given sufficient notice to the claimant, be deemed waived on subsequent judicial review." (emphasis added). Two others, Meanel v. Apfel, 172 F.3d 1111, 1115 (9th Cir.1999), amended by Meanel v. Apfel, ___ F.3d ___, No. 97- 55827, 1999 WL 415342 (9th Cir. June 22, 1999), and Brewer v. Chater, 103 F.3d 1384, 1393 (7th Cir.1997), concern arguments raised before neither the ALJ nor the Appeals Council--perhaps presenting a stronger case for a waiver rule. Here, by contrast, the only procedural default alleged by the Commissioner and found by the district court is Harwood's failure to bring two particular issues to the Appeals Council's attention. We need not decide whether Harwood's apparent failure to raise two of his issues before the ALJ is fatal to his claims, but it strikes us as odd that Harwood could "waive" his argument that the ALJ should have acted sua sponte to develop the record more fully.

FN4. See Paul v. Shalala, 29 F.3d 208, 210 (5th Cir.1994) (no jurisdiction to review claim not raised before Appeals Council).

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Walter JOHNSON, Plaintiff-Appellant,
v.
Kenneth S. APFEL, Commissioner of Social Security, Defendant-Appellee.

No. 98-4284.

United States Court of Appeals,
Seventh Circuit.

Argued Aug. 3, 1999.

Decided Aug. 30, 1999.

Appeal from the United States District Court for the Southern District of Indiana, Indianapolis Division. No. 97 C 1863--Larry J. McKinney, Judge.

Before POSNER, Chief Judge, and EASTERBROOK and MANION, Circuit Judges.

POSNER, Chief Judge.

*1 Mr. Johnson sought review in the district court, pursuant to 42 U.S.C. sec. 405(g), of the denial by the Social Security Administration of his claim for disability benefits. The district court upheld the denial on the merits, and Johnson has appealed to us. But the Administration asks us not to consider the merits of the appeal, on the ground that Johnson failed to advise the Administration's Appeals Council of the issue that he wants us to decide (he did present it to the district court). Johnson's last full-time job was as a carpenter, and the administrative law judge found that despite the alleged disability Johnson could still do a carpenter's work. Johnson challenges this finding on the ground that the administrative law judge had purported to accept medical reports from two physicians who found that Johnson has only limited use of his right arm (and he is right-handed), and did not explain how one can do carpentry with such a limitation. But in his letter asking the Appeals Council to review the administrative law judge's decision, Johnson's then lawyer did not make this argument. Apart from unrelated and now-abandoned procedural points, the letter recites evidence indicating that Johnson has arthritis and other ailments, and "loss of range of motion." There is no reference to the right arm, and the letter ends with the mysterious statement: "These are the 'objective medical findings' which the ALJ found shows only minimal findings."

If this letter were a brief in this court, there would be no doubt that Johnson had waived his right to raise the right-arm issue; for we require that an issue to be preserved must be developed and not merely mentioned (here barely alluded to). E.g., JTC Petroleum Co. v. Piasa Motor Fuels, Inc., No. 98-3919, slip op. at 10-11 (7th Cir. Aug.17, 1999); Huntzinger v. Hastings Mutual Ins. Co., 143 F.3d 302, 308 n. 7 (7th Cir.1998); Colburn v. Trustees of Indiana University, 973 F.2d 581, 593 (7th Cir.1992); Turner v. Chicago Housing Authority, 969 F.2d 461, 463 (7th Cir.1992); Burdett v. Miller, 957 F.2d 1375, 1382 (7th Cir.1992). Likewise if Johnson had made so murky a presentation to the administrative law judge. E.g., Brewer v. Chater, 103 F.3d 1384, 1393 (7th Cir.1997). And a number of cases, including some in this court, hold or assume that the same is true of an appeal from an administrative law judge to the Appeals Council. Banuelos v. Apfel, 165 F.3d 1166, 1170 (7th Cir.1999) (alternative holding); Brewer v. Chater, supra, 103 F.3d at 1393; Griffith v. Callahan, 138 F.3d 1150, 1154 (7th Cir.1998) (alternative holding); Limberopoulos v. Shalala, 17 F.3d 975, 979 (7th Cir.1994); Pope v. Shalala, 998 F.2d 473, 480 n. 6 (7th Cir.1993); Papendick v. Sullivan, 969 F.2d 298, 302 (7th Cir.1992); James v. Chater, 96 F.3d 1341, 1343-44 (10th Cir.1996); Paul v. Shalala, 29 F.3d 208, 210-11 (5th Cir.1994); see Jon C. Dubin, "Torquemada Meets Kafka: The Misapplication of the Issue Exhaustion Doctrine to Inquisitorial Administrative Proceedings," 97 Colum. L.Rev. 1289, 1310-16 (1997). But these decisions--as the Eighth Circuit has also concluded, in a decision rendered after the oral argument in this case, Harwood v. Apfel, No. 98-2700, 1999 WL 608649 (8th Cir. Aug.13, 1999)-- cannot be squared with the regulations governing appeals to the Appeals Council. Our cases do not mention the regulations, which may not even have been cited to us. Papendick, the first in our line, relies entirely on a decision that involved the doctrine of exhaustion of remedies in an unrelated area of administrative regulation, Weyerhaeuser Co. v. Marshall, 592 F.2d 373, 376 (7th Cir.1979), while in the present case the agency doesn't even argue that there was a failure to exhaust.

*2 The regulations permit but do not require the filing of a brief with the Appeals Council. 20 C.F.R. sec. 404.975. All that is required is completion of a one-page form (Form HA-520) that provides only a space of three lines (roughly two inches in total) for the statement of the issues and grounds for appeal.

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EXHIBIT B

20 C.F.R. sec. 422.205(a). (Johnson's lawyer appended his onepage letter to the form rather than attempting to squeeze his argument into the tiny space.) The Appeals Council's review is, moreover, plenary unless the Council states otherwise. sec. 404.976(a). Basically all that seems contemplated or required is that the disappointed claimant ask the Appeals Council to take a look at what the administrative law judge has done and reverse if it finds an error. The Appeals Council operates more like a complaint bureau than an appellate court; the Social Security Administration estimates that the Council spends no more than 10 minutes per appeal, on average. Dubin, supra, 97 Colum. L.Rev. at 1326 n. 181. We do not know what the Appeals Council does in cases in which the appellant leaves the space in his Form HA-520 completely blank, and therefore need not decide whether that would be a case of waiver.

The only reference in the regulations to anything that looks like waiver is a warning that if the applicant fails to "take the next step [in the review process] within the stated time period, you will lose your right to further administrative review and your right to judicial review" (unless you show cause for the failure). 20 C.F.R. sec. 404.900(b). Johnson took the required next step after being turned down by the administrative law judge by filing his Form HA520 on time with the Appeals Council. The Social Security Administration knows how to draft a waiver rule. If courts take it upon themselves to adopt waiver rules for the agency that compel disappointed applicants for disability benefits to bombard the Appeals Council with full briefs in order to preserve their right to judicial review, we shall be disserving the agency. The government's lawyers argue that Johnson has waived his right to present the "right arm" issue to us because of his failure to present it perspicuously to the Appeals Council, yet they are explicit that he did not fail to exhaust his administrative remedies. We take this to mean, consistent with the discussion in the preceding paragraph, that requiring the claimant to brief his issues before the Appeals Council is not important to the agency's mission. (Because we are overruling the decisions of this court, cited earlier, that impose this requirement, we have circulated our opinion to the full court, as required by 7th Cir. R. 40(e). No judge in regular active service asked that the case be heard en banc.)

It may be arguable that the letter by Johnson's lawyer was positively misleading--was calculated to deflect the Appeals Council from taking a close look at the right-arm issue, since that issue wasn't discussed but others were (sort of). But the Administration's lawyers do not argue this, and that is a waiver, since by failing to argue it they deprived Johnson of an opportunity to meet the argument.

*3 So we come to the merits. When a claimant argues that there are fatal gaps or contradictions in the administrative law judge's opinion, thus appealing to the important principle of administrative law that the agency provide a rational articulation of the grounds of its decision, SEC v. Chenery Corp., 318 U.S. 80, 94-95, 63 S.Ct. 454, 87 L.Ed. 626 (1943); Sarchet v. Chater, 78 F.3d 305, 307 (7th Cir.1996); Rohan v. Chater, 98 F.3d 966, 971 (7th Cir.1996); Herron v. Shalala, 19 F.3d 329, 333 (7th Cir.1994); Schurz Communications, Inc. v. FCC, 982 F.2d 1043, 1049 (7th Cir.1992), we give the opinion a commonsensical reading rather than nitpicking at it. E.g., Bowman Transportation, Inc. v. Arkansas-Best Freight System, Inc., 419 U.S. 281, 286, 95 S.Ct. 438, 42 L.Ed.2d 447 (1974); Rohan v. Chater, supra; Cronin v. U.S. Dept. of Agriculture, 919 F.2d 439, 442-43 (7th Cir.1990). In this case the opinion recites at great length the medical evidence of Johnson's alleged disability, including a report by one doctor that Johnson has a diminished range of motion in his right arm. The opinion rejects this evidence on the ground that it was based solely on Johnson's statement to the doctor and that while Johnson attributed the problem to a wall falling on him he was unable to produce any evidence of the accident or of any treatment for it. It was after this that the administrative law judge mentioned medical opinions "from the State Agency physicians who essentially concluded that the claimant can perform a wide range of medium work activity.... There is no objective medical evidence invalidating this residual functional capacity. Consequently I adopt the opinion of the State Agency physicians." He neglected to point out that these physicians had checked the box for "limited" beside a subcategory of "manipulative limitations" captioned "Reaching all directions (including overhead)." Since elsewhere in the report the physicians had indicated in detail an absence of any relevant exertional limitations, the administrative law judge was entitled to conclude that the fact that Johnson cannot reach in all directions without some unspecified limitations was insufficient to establish that he can't perform his past work as a carpenter. That the administrative law judge did conclude this rather than overlook the check mark in the "limited"

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box seems to us the most plausible interpretation of the opinion, and no more is required to uphold it. Books v. Chater, 91 F.3d 972, 980 (7th Cir.1996); Diaz v. Chater, 55 F.3d 300, 307-08 (7th Cir.1995); Carlson v. Shalala, 999 F.2d 180 (7th Cir.1993) (per curiam).

Affirmed.

END OF DOCUMENT

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SOCIAL SECURITY

Office of the General Counsel

JUL 15 1999

Ms. Nancy G. Shor
Executive Director
National Organization of Social Security
Claimants' Representatives
6 Prospect Street
Midland Park, New Jersey 07432

Dear ~~Ms. Shor~~ Nancy:

Thank you for affording me the opportunity to participate in the recent conference of the National Organization of Social Security Claimants' Representatives (NOSSCR). Although our dialogues revealed, not surprisingly, that there are certain differences of perspective between NOSSCR members and the Social Security Administration's (SSA) Office of the General Counsel (OGC), it was apparent that we share a commitment to fairness, justice, open communication and responsible advocacy in an area of the law which affects so profoundly the lives of so many. It is my sincere hope that the candid and respectful sharing of views which characterized our dialogues will lead to improved understanding, an even more productive working relationship between SSA and members of the legal advocacy community, and better SSA processes supporting litigation to the benefit of all concerned.

At the conference, NOSSCR members expressed concerns regarding OGC's perceived policy in a number of specific areas, in particular, the defensive citation of the "administrative waiver" rule, the Government's role in the attorney fee process under § 206(b) of the Social Security Act, and the content of remand orders when remands have been voluntarily initiated by the Government. In this letter, I will attempt to clarify OGC's position with regard to each of these issues.

The Administrative Waiver Rule

As you know, most circuit courts have now adopted, in Social Security disability cases, the longstanding rule of administrative law that issues not asserted with particularity at the administrative level will not be considered on subsequent judicial review, and no appellate court has opined that the rule is inapplicable in the Social Security context. This court-fashioned rule, which has been variously termed "administrative waiver" and "issue exhaustion," is designed to enable the administrative process to function on a more informed basis, to the benefit of disability claimants as well as Agency adjudicators, and to obviate the need for court

EXHIBIT C

involvement in certain cases by timely alerting the Agency to the need for corrective action prior to the commencement of litigation. To their credit, an increasing number of Social Security practitioners are now heeding the litany of judicial pronouncements, and we are seeing more clearly defined challenges being asserted, and at times accepted, at the Appeals Council level.

While we believe that the administrative waiver rule helps to promote better service to disability claimants, we also note that the defensive utilization of the administrative waiver rule must, at times, be limited to avoid possible injustice. Accordingly, OGC litigators do not cite the rule in cases where plaintiffs are unrepresented at the administrative level; do not rely exclusively on the rule, without a substantive response to the particular challenges asserted by the plaintiffs; and do not consider the rule in making pre-briefing defensibility determinations. In light of the concerns expressed by NOSSCR members, we will redouble our efforts to ensure that our litigators apply these principles when considering this argument.

Attorney Fees under the Social Security Act

The courts have frequently recognized that the Commissioner has a legitimate role in the fee determination process under § 206(b) of the Social Security Act, 42 U.S.C. § 406(b), a role designed to ensure that claimants' past-due benefits are not unduly eroded and one which recognizes the impartial expertise which the Commissioner can provide. In performing this advisory role, we are cognizant, of course, of the attorney's right to reasonable compensation. We are equally aware that the statutory entitlement to a "reasonable" fee does not necessarily equate to a contractually-specified contingent fee, particularly since the amount of the contingent fee may be related to factors other than the skill and effort of counsel, such as the claimant's prior earnings and the number of his or her dependents.

In this context, our attorneys take seriously their responsibility to protect claimants from the relatively rare instances of over-reaching by their counsel in the fee application process. Accordingly, while in many (perhaps most) cases we do not oppose the fees requested, we view such oppositions as being justified where (1) the hourly rate claimed is clearly in excess of the rate prevailing in the particular jurisdiction involved and/or (2) the hours itemized are either clearly excessive for the discrete categories of work performed or include items which have been judicially viewed as non-compensable (such as clerical tasks or the preparation of fee petitions).

We recognize, of course, that perceptions may differ as to when a requested fee falls short of the statutory standard of reasonableness, particularly when one's financial interest is at stake. Nevertheless, by adhering (in our advisory role) to those guidelines which have been carefully enunciated by the courts, we believe that we can assist in achieving the desired balance between the competing interests of plaintiffs' attorneys and their clients in the fee determination process.

Remand Orders

We are currently in the process of formulating a nationwide practice regarding the content of remand orders when remands have been voluntarily initiated by the Government. Accordingly, while there may currently be inconsistencies in the approach taken by particular OGC offices and individual litigators, we are hopeful that these inconsistencies will be minimized in the near future with the adoption of a standardized, nationwide approach.

In broad outline, under the process we are considering, OGC will attempt to ensure that ALJs are afforded adequate discretion in the post-remand development of cases in light of the evidence presented, without judicially-imposed constraints which might well prove to be unnecessary in the course of the post-remand proceedings. For example, while an ALJ's failure to have obtained vocational expert testimony might have provided the basis for the Government's remand request in a particular case, a court order mandating such testimony could conceivably be inappropriate where a reevaluation of the record as a whole leads the ALJ to conclude that an allowance is warranted at the Listing step of the sequential evaluation process. Although we will accordingly be seeking generalized orders of remand from the courts, i.e., for further administrative proceedings, we are attempting to ensure that the subsequent orders of remand issued by the Appeals Council will be sufficiently detailed to apprise the ALJs of the substantive and procedural deficiencies which formed the basis for the requested remand.

I trust that this letter is responsive to the concerns expressed by your members, and look forward to a continuation of our candid and productive discussions.

Very truly yours,

Arthur J. Fried
General Counsel

(6)

No. 98-9537

Supreme Court, U.S.
FILED
JAN 11 2000
CLERK

In The

Supreme Court of the United States

JUATASSA SIMS,

Petitioner,

vs.

KENNETH S. APFEL,
Commissioner of Social Security,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit

JOINT APPENDIX

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Petition For Certiorari Filed: May 19, 1999
Certiorari Granted: November 29, 1999

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90 pp

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APPEAL CLOSED
SS

U.S. District Court
Northern District of Mississippi (Delta)

CIVIL DOCKET FOR CASE #: 97-CV-94

Sims v. Callahan - Filed: 05/23/97
Assigned to: Judge Neal B. Biggers, Jr.
Demand: $0,000
Lead Docket: None
Dkt# in other court: None

Nature of Suit: 863
Jurisdiction: US Defendant

Cause: 42:405 Review of HHS Decision (DIWW)

5/23/97	1	COMPLAINT for Review of Final Decision of Sec. of HHS FILING FEE $150.00 RECEIPT # 47777 CASE REFERRED to Magistrate Judge Eugene M. Bogen; Case Assigned to CJRA Track: Administrative (tab) [Entry date 05/27/97]
5/23/97	___	NOTICE OF ASSIGNMENT Judge Neal B. Biggers Jr. and Magistrate Judge Eugene M. Bogen (tab) [Entry date 05/27/97]
5/23/97	___	SUMMONS (ES) issued for John J. Callahan, Acting Commissioner of SSA, Attorney General Janet Reno, Civil Process Receiver, U. S. Attorney (tab) [Entry date 05/27/97]
6/23/97	2	SUMMONS Returned Executed as to John J. Callahan, U.S. Attorney (Alfred E. Moreton III), U.S. Attorney General (Janet Reno) 6/9/97 Answer due on 6/29/97 for John J. Callahan (sta)

8/1/97	3	ANSWER & TRANSCRIPT to Complaint by John J. Callahan (Attorney Ralph M. Dean) (tab)
8/13/97	4	ORDER, that the plaintiff shall file her brief by 09/11/97; within 30 days of service of plaintiff's brief, defendant shall file a brief in response. Plaintiff may file a brief in reply to the brief of defendant within 10 days of service of defendant's brief; setting Social Security ORAL ARGUMENT for 2:30, 11/20/97, in Oxford, before Magistrate Judge Eugene M. Bogen; (signed by Magistrate Judge Eugene M. Bogen on 08/11/97); Date of Entry: 08/13/97. (nfs)
9/11/97	5	MEMORANDUM by Jautassa Sims in support of [1-1] social security complaint. (nfs)
10/15/97	6	MEMORANDUM by John J. Callahan in support of Commissioner's decision. (nfs) [Entry date 10/17/97]
11/20/97	___	RECEIVED tape of social security hearing held 11/20/97. (tab)
11/20/97	___	Social Security ORAL ARGUMENT held on 11/20/97, Oxford before Magistrate Judge Eugene M. Bogen. (tab)
11/20/97	7	CIVIL MINUTES for: Social Security Hearing Held 11/20/97, Oxford before Mag. Judge Bogen Court Reporter: Tape #2 Recommendation that the Commissioner be affirmed. (tab)
11/25/97	8	REPORT AND RECOMMENDATIONS recommended that the decision of the

		Commissioner be affirmed and the complaint dismissed with prejudice of Magistrate Judge Eugene M. Bogen. Case no longer referred to Magistrate Judge Eugene M. Bogen Objections to R and R due by 12/8/97 (sta) [Entry date 11/26/97]
12/12/97	9	OBJECTION to [8-1] report and recommendations by Juatassa Sims (sta) [Entry date 12/15/97]
1/12/98	10	FINAL JUDGMENT, ADOPTING and APPROVING [8-1] report and recommendations, Dismissing this action with prejudice; (signed by Judge Neal B. Biggers Jr. on 01/09/98); COB #34, pgs. 135-136; Date of Entry: 01/12/98. (nfs)
1/12/95	___	Case Closed (nfs)
3/2/98	11	NOTICE OF APPEAL of [10-1] order Dismissing this action with prejudice by Juatassa Sims. FILING FEE $105.00; RECEIPT #50522. (nfs) [Entry date 03/03/98]
3/2/98	___	Notice of Appeal and certified copy of docket to USCA: [11-1] appeal by Juatassa Sims. (nfs) [Entry date 03/03/98]
3/9/98	___	Transcript requested [11-1] appeal by Juatassa Sims. (nfs)
3/11/98	___	Certified and transmitted Record on Appeal to U.S. Court of Appeals: [11-1] appeal by Juatassa Sims. (nfs)

3/11/98 ___ USCA Case Number, Re: [11-1] appeal by Juatassa Sims. USCA NUMBER: 98-60126.

GENERAL DOCKET FOR
Fifth Circuit Court of Appeals

Filed: 3/9/98

Court of Appeals Docket #: 98-60126
Nsuit: 2863 Social Security: DIWC/DIWW
Sims v. Apfel
Appeal from: Northern District of Mississippi, Oxford

Lower court information:

District: 0537-3 : 2:97-CV-94-B
Ordering Judge: Neal B Biggers, Jr, Chief Judge
Date Filed: 5/23/97
Date order/judgment: 1/12/98
Date NOA filed: 3/2/98

3/9/98 Social Security case docketed. NOA filed by Appellant Juatassa Sims. [98-60126] (kgl)

3/9/98 Record requested from district court. [98-60126] ROA due on 3/24/98. (kgl)

3/16/98 Record on appeal filed. Pleadings: 1 vol Transcripts: 1 vol. [98-60126] ROA ddl satisfied. (cgl)

3/26/98 Appearance form filed by Chantal J Harrington for Appellant Juatassa Sims, Gary R Parvin for Appellant Juatassa Sims. [98-60126] (kgl)

3/26/98 Appearance form filed by James William Warren for Appellee Kenneth S Apfel, Clavin D Buchanan for Appellee Kenneth S Apfel. [98-60126] (kgl)

4/10/98 Briefing notice issued. [98-60126] A/Pet's Brief due on 5/20/98 for Juatassa Sims. (cgl)

4/10/98 Record on appeal released to attorney Gary R Parvin for Appellant Juatassa Sims. Volumes: 2. [98-60126] (cgl)

4/10/98 Appearance form filed by Elyse S Sharfman for Appellee Kenneth S Apfel, Scott E Heffington for Appellee Kenneth S Apfel. [98-60126] (kgl)

4/10/98 Appearance form filed by Mary Ann Sloan for Appellee Kenneth S Apfel, Dennis R Williams for Appellee Kenneth S Apfel. [98-60126] (kgl)

5/20/98 Appellant's Brief filed by Appellant Juatassa Sims. Copies of Brief: 7 # of pages: 44. Lines of text: 1239 Date of COS: 5/19/98 Sufficient [Y/N]: n Bohr needs an appearance form. [98-60126] A/Pet's brief ddl satisfied. E/Res's Brief due on 6/19/98 for Kenneth S. Apfel. Sufficient Brief due on 6/1/98 for Juatassa Sims. (trm)

5/20/98 Record excerpts filed by Appellant Juatassa Sims # of copies: 4 Sufficient [Y/N]: n needs certificate of service [9-60126] Sufficient Record Excerpts due on 6/1/98 for Juatassa Sims (trm)

6/9/98 Extension granted by phone until: 7/3/98 to file appellee's brief for Appellee Kenneth S. Apfel. [98-60126] (cnf)

6/16/98 Confirmation letter filed by Appellee Kenneth S Apfel confirming an extension of time to and including 7/3/98 for confirming an extension

of time to and including 7/3/98 for filing appellee's brief. [98-60126] E/Res's Brief ddl updated to 7/3/98 for Kenneth S Apfel. (kgl)

6/17/98 Record on appeal forwarded by Sarah Harriet Bohr for Appellant Juatassa Sims to Scott E Heffington for Appellee Kenneth S Apfel. Volumes: 2 [98-60126] (ksw)

7/1/98 Appearance form filed by Sarah Harriet Bohr for Appellant Juatassa Sims. [98-60126] Sufficient Brief ddl satisfied. (kgl)

7/1/98 Record Excerpts made sufficient by Appellant Juatassa Sims [98-60126] Sufficient Record Excerpts ddl satisfied. (ksw)

7/2/98 Appearance form filed by Joseph P Palermo for Appellee Kenneth S Apfel. [98-60126] (kgl)

7/6/98 Record on appeal returned to 5CCA. Volumes: 2 [98-60126] (trm)

7/6/98 Appellee's Brief filed by Appellee Kenneth S Apfel. Copies of Brief: 7 # of pages: 29. Date of COS: 7/2/98 Sufficient [Y/N]: y. [98-60126] E/Res's Brief ddl satisfied. Reply Brief due on 7/20/98 for Juatassa Sims. (trm)

7/7/98 The attorney Elyse S Sharfman for Kenneth S Apfel, attorney James William Warren for Kenneth S Apfel not participating in case. [98-60126] (trm)

7/14/98 Unopposed extension granted by phone until: 7/27/98 to file reply brief for Appellant Juatassa Sims. [98-60126] (cmb)

7/17/98 Confirmation letter filed by Appellant Juatassa Sims confirming an extension of time to and including 7/27/98 for filing reply brief.

[98-60126] Reply Brief ddl updated to 7/27/98 for Juatassa Sims. (kgl)

7/20/98 The attorney Ralph M Dean for Kenneth S Apfel not participating in case. See 7/20/98 letter in file. [98-60126] (trm)

7/27/98 Reply brief filed by Appellant Juatassa Sims. Copies of Brief: 7 # of pages: 15. Date of COS: 7/25/98 Sufficient [Y/N]: y. [98-60126] Reply Brief ddl satisfied. (trm)

11/6/98 Opinion filed. Issue Mandate due on 12/28/98. [98-60126] (ymj)

11/6/98 Judgment entered and filed. [98-60126] (ymj)

12/21/98 Petition filed by Appellant Juatassa Sims for rehearing. # of copies filed: 4 [1147342-1] Issue Mandate ddl canceled. [98-60126] (kgl)

2/18/99 COURT Order filed denying petition for rehearing [1147342-1] Issue Mandate due on 2/25/99. Copies to all counsel. [98-60126] (mrw)

2/26/99 Mandate issued. Approved BOC Issued (Y/N)?: n [98-60126] Issue Mandate ddl satisfied. (sds)

2/26/99 Record on appeal returned to USDC. Volumes: 2. [98-60126] (sds)

6/1/99 Supreme Court notice that petition for writ of certiorari was filed on 5/19/99 by Appellant Juatassa Sims. Supct No.: 98-9537 [98-60126] (cmb)

12/2/99 Supreme Court order received granting petition certiorari [1301893-1] by Appellant Juatassa Sims on 11/29/99. [98-60126] (jbg)

CLAIMANT'S MEMORANDUM TO THE ADMINISTRATIVE LAW JUDGE

MEDICAL SUMMARY – JUATASSA SIMS – HEARING 9/12 JUDGE E. MORRISS

She is admitted to Senatobia Hospital on 2/7/92. This notes she is pregnant but was not certain about her last period. She has not been compliant with office visits. At about 16 weeks gestation, she was found to have gestational diabetes. She was not very compliant with her diet. She was also found to be a fibroid uterus. She has also been found to have thyroid enlargement as well as fetal and maternal tachycardia. She has had fluid retention with puffiness of the face and ankle edema. At the last pelvis ultrasound, she was found to have polyhydramnios. She has 1+ pitting edema of the lower extremities. She is treated with bedrest and is treated for hiatal hernia and tachycardia. Final diagnoses include thyroid dysfunction and iron deficiency anemia. (Exhibit 16)

She is readmitted on 2/25/92 after being seen in the office with mild hypertension at 130/90 and with complaint of being nervous and depressed. She is admitted for evaluation of pre-eclampsia, possibly amniocentesis and C-section. She is 40 years old and the baby is rather large. By the time of admission, blood pressure was 138/98. She has 1+ pitting edema and puffiness of the face. She has some superficial varicosities of her lower extremities. She was unable to lie on her back because of the large baby and had syncopal attacks with the same. She was extremely short of breath with lying back. She is extremely anxious and depressed. She underwent amniocentesis and her blood pressure was not well controlled

and she had synocopal attacks with blood pressure dropping 70/50 at one time with amniocentesis. She was more and more uncomfortable and finally requested a C-section. Epidural anesthesia was administered and she delivered. Polyhydramnios was present. She also had multiple fibroids. A bilateral partial salpingectomy was carried out by Pomeroy's method. (Exhibit 16)

She is seen in the ER of Senatobia Community Hospital on 3/4/92. Blood pressure is 150/96. She complains of her feet swelling and numbness in the left hand. She had a baby on 2/26/92. On exam, she has 4+ pitting edema in the feet and legs. Diagnoses are hyertension and peripheral edema. (Submit)

Records from Dr. Pravin Patel of 8/2/94 show her weight to be 226. She complains of low back pain since her C-Section when she received an epidural. On exam, she is tender at L5-S1. These notes also indicate carpal tunnel syndrome. On 8/15/94, weight is 222. An additional note, believed to be dated 8/15/94, indicates that ultrasound showed cholelithiasis. Chest x-ray revealed cardiomegaly and lumbar spine x-ray revealed mild degenerative joint disease. (Exhibit 17)

Included in Dr. Pravin Patel's records is a lab report of 8/17/94 which shows on the Thyroid Profile that TSH is low at .11, T4 is high at 12.9 and Free Thyroxine Index is high at 4.1. (Exhibit 17)

Dr. William Mayers does a consultative examination on 10/13/94. She reports back pain since April, 1992. She reports an epidural anesthetic in February, 1992 for a Cesarean section. The back pain then began in April and began as a sudden onset of pain which has been present

ever since. It is becoming progressively worse. The pain is constant every day but becomes severe once a month. It lasts for three to four days and she is bedridden during this time, only getting up to go to the bathroom. She remains in bed for about two days and the pain subsides. The pain radiates into the posterior aspect of both legs, left worse than right. Her left leg gives way sometimes when she is in severe pain. The leg goes numb sometimes. The back pain is aggravated by lifting, walking, standing or sitting. She can lift 10 pounds and carry it a short distance. She can walk one block and has to rest due to pain and shortness of breath. She can stand for 5 minutes. She can sit for twenty to thirty minutes if she has support of her back. She is not able to do mopping, but the other light house hold chores she does at her own pace. She cannot stand long enough to completely wash dishes. She reports an enlarged thyroid present for about 5 years. She has developed problems swallowing and sometimes talking. She has been told the medication would possibly shrink her thyroid and she would not have to have surgery, but this has become questionable. She is anxious over the possibility of surgery. She also reports weakness in her right arm extending from her shoulder to her hand. She has decreased grip strength in right hand and occasionally drops things. She reports shortness of breath with exertion. On exam, she is 64 inches tall and weighs 221. She is able to bend 45 degrees, extend 45 degrees and can rotate 80 degrees bilaterally. None of these caused neck pain. Her thyroid is profusely enlarged. Strength of the major muscle joints in the upper extremities is 5/5. Range of motion of shoulders and elbows is full. Grip strength, pinch and key pinch are 5/5

on left and 3/5 on the right. She has good grasp ability of both hands, but is slower on the right. In the back, there is vague tenderness in the lower lumbar area, more so on the right. Range of motion is 90 degrees forward bending, 20 degrees lateral bending bilaterally and she was able to extend 20 degrees. She was able to straight leg raise to 70 degrees in the supine position. Right straight leg raising caused pain down the lateral aspect of the right thigh. In the suprine position, she was able to straight leg raise to 40 degrees and this caused pain down the lateral aspect of the thigh. Dr. Mayers notes that it is interesting that in her history, she has more pain on the left but on exam, she has findings on the right. She was able to squat about three fourths of the way to the floor and could go no further because of pain in her back. Deep tendon reflexes were unobtainable. Reflexes from biceps, triceps, brachioradialis, knee jerks or ankle jerks could not be obtained. Pinprick is equal and normal except for the lateral aspect of the right lower leg. This corresponds with S1 dermatome. Impression is back pain, etiology undetermined, possibly degenerative disc disease, diffuse thyroid enlargement and weakness, right hand and arm, possibly carpal tunnel syndrome. X-ray of the lumbar spine reveal narrowed interspaces at L3-L4 and L4-L5. A small density is demonstrated overlying the left side of the pelvis, most likely representing calcification within a small cyst. (Exhibit 18)

Dr. Patel's notes of 5/15/95 indicate that an Echo showed LA to be slightly enlarged. The aortic valve was thickened. The LV post. wall is thin and its contraction is poor. IVS motion is abnormal. She is referred to Dr. Purdon. (Submitted with letter of 7/26/95)

Dr. J.S Purdon sees her on 5/25/95 on referral from Dr. Patel. She has a history of chest pain, shortness of breath and fatigue. Much of this may be deconditioning. She reports that she thinks she had rheumatic fever at about age 2. Echocardiogram is fine. Stress test is negative. She had a little chest pain within the first minute that was a sharp chest wall like pain that abated with activity. (Submit)

On 9/7/95, she is seen by Dr. Joe E. Morris, Ph.D. for a psychological evaluation. She is 5'5" and weighs 224. She exhibited a somewhat rigid posture and exhibited a number of nervous mannerisms. She would ring [sic] her hands, rub her arm and rub her eyes. From time to time, she exhibited a nervous laughter which appears to be masking a rather severe depression. She indicated she was in pain. She reports that her relations with others depend on how they treat her and she was very vague and non-specific in her responses on this particular issue. She does not actively seek contact with people outside of the home. She does not attend church and belongs to no group. There were overt behavioral indicators of anxiety in suggesting motor tension and autonomic hyperactivity. She had great difficulty reading and had to adjust her eyes very frequently to items on the table. Her overall emotional state was one of severe depression with mostly constricted affect, punctuated at times by nervous laughter. She stated one time that she had to laugh to cover up all the bad things that are going on. She averages about 5 hours of continuous sleep and wakes frequently because of nervousness. She admits to suicidal thoughts and was strongly encouraged to seek help at a mental health center. She stays depressed most of the time without mood

swings but does have explosive outbursts on a daily basis. Psychomotor activity is sluggish. She needs an eye exam as she has significant visual deficits. She may have hearing problems as a number of questions had to be repeated. On the WAIS-R, she obtained a Verbal IQ of 83, a Performance IQ of 72 and a Full Scale IQ of 81. These are in the borderline range and are felt to valid. Her Performance score is probably depressed due to visual deficits. On the WRAT-R, she obtained a score in Reading at the 23rd percentile, in Spelling at the 34th percentile and in Arithmetic at the 37th percentile. These are basically consistent with IQ scores though somewhat higher and more within the average range. On the MMPI, she obtained a profile indicative of depression with numerous somatic complaints as well as indications of withdrawal and poor reality testing. On the IPAT Depression Scale, she obtained a score of 10 which is indicative of very high levels of depression. On the IPAT Anxiety Scale, she obtained a score of 10 indicating very high levels of anxiety. On the BECK Depression scale, she obtained a score of 50 which is in the very severe range of depression. On the Symptom Inventory Checklist, she reports daily symptoms of, among others, nervousness, problems sleeping, irritability, lack of interest in sex, family, social and recreational activities, depression, crying spells, feelings of worthlessness and difficulties in concentration. Very often or two or three times a week she experiences feelings of terror or panic. In summary, Dr. Morris notes she seems easily frustrated with very low frustration tolerance. He had to repeat several items and simple instructions twice. She presents with symptoms of Panic Disorder. She may have difficulty responding

favorably to supervision and interacting with co-workers because of her emotional instability, daily explosive outbursts and her daily crying spells. Concentration and attention appear to be markedly affected. Diagnoses are panic disorder with agoraphobia (provisional), major depression, recurrent, severe without psychotic features and without interepisode recovery, rule out somatization disorder and undifferentiated somatoform disorder. She meets the criteria for Listing 12.04 with her depressive syndrome with sleep disturbance, feelings of worthlessness, difficulties concentrating or thinking and thoughts of suicide. She also meets Listing 12.06 with her panic attacks with motor tension, autonomic hyperactivity, apprehensive expectation and vigilance and scanning. These impairments in combination have resulted in a marked restriction of activities of daily living, marked difficulties in maintaining social functioning and deficiencies of concentration, persistence or pace resulting in frequent failure to complete tasks in a timely manner. She also probably meets Listing 12.07 with a history of multiple symptoms of several years duration beginning before age 30. On his Assessment, he rates her as markedly limited in six out of 8 of the Sustained Concentration and Persistence categories and moderately limited in the other two. The marked impairments include her ability to maintain attention and concentration for extended periods, her ability to perform activities within a schedule, maintain regular attendance and be punctual with customary tolerances, her ability to sustain an ordinary routine without special supervision, her ability to work in coordination or proximity with others without being distracted by them and her ability to complete a normal

workday or workweek without interruptions from psychologically based symptoms and to perform at a consistent pace without an unreasonable number and length of rests periods. She is moderately limited in three out of five of the Social Interaction categories. (Submit)

LIST OF DIAGNOSIS AND SELECTED POSITIVE FINDINGS

A. Mental

1. 2/7/92 – Senatobia Hospital – Is pregnant but is not sure of her last period.
2. 2/7/92 – Senatobia Hospital – Has not been compliant with office visits.
3. 2/7/92 – Senatobia Hospital – Has gestational diabetes and is not compliant with diet.
4. 2/25/92 – Senatobia Hospital – Nervous and depressed.
5. 2/25/92 – Senatobia Hospital – Is extremely anxious and depressed.
6. 10/13/94 – Dr. Mayers – She has more pain on the left but findings on the right.
7. 9/7/95 – Dr. Morris – Exhibited a somewhat rigid posture and a number of nervous mannerisms in ringing [sic] her hands, rubbing her arm and rubbing her eyes.
8. 9/7/95 – Dr. Morris – Exhibited a nervous laughter from time to time and this appears to be masking a rather severe depression.
9. 9/7/95 – Dr. Morris – Does attend church and belongs to no groups.

10. 9/7/95 – Dr. Morris – Does not actively seek contact with people outside of the home.

11. 9/7/95 – Dr. Morris – Overall emotional state was one of severe depression with mostly constricted affect, punctuated at times with a nervous laughter.

12. 9/7/95 – Dr. Morris – Reports she has to laugh to cover up al [sic] the bad things that are going on.

13. 9/7/95 – Dr. Morris – Averages 5 hours of continuous sleep each evening wakening frequently due to nervousness.

14. 9/7/95 – Dr. Morris – Admits to suicidal thoughts and was strongly encouraged to seek help at the mental health center.

15. 9/7/95 – Dr. Morris – Reports explosive outbursts on a daily basis.

16. 9/7/95 – Dr. Morris – Psychomotor activity is sluggish.

17. 9/7/95 – Dr. Morris – WAIS-R Verbal IQ of 83, Performance IQ at 72 and Full Scale IQ at 81 with WRAT-R scores consistent with this.

18. 9/7/95 – Dr. Morris – MMPI – Profile was indicative of depression with numerous somatic complaints as well as indications of withdrawal and poor reality testing.

19. 9/7/95 – Dr. Morris – IPAT Depression Scale score of 10, indicative of very high levels of depression.

20. 9/7/95 – Dr. Morris – IPAT Anxiety Scale score of 10, indicative of very high levels of anxiety.

21. 9/7/95 – Dr. Morris – BECK Depression Scale score of 50, in the very severe range.

22. 9/7/95 – Dr. Morris – Daily symptoms reported are nervousness, problems sleeping, irritability, lack of interest in sex, family, social and recreational activities, depression, crying spells, feelings of worthlessness and difficulties in concentration.

23. 9/7/95 – Dr. Morris – Two or three times a week, she experiences feelings of terror or panic.

24. 9/7/95 – Dr. Morris – Seems easily frustrated with very low frustration tolerance.

25. 9/7/95 – Dr. Morris – Has symptoms of panic disorder.

26. 9/7/95 – Dr. Morris – May have difficulty responding favorably to supervision or interacting with co-workers due to her emotional instability, her daily explosive outbursts and her daily crying spells.

27. 9/7/95 – Dr. Morris – Concentration and attention are maredkly [sic] affected.

28. 9/7/95 – Dr. Morris – Meets Listing 12.04, 12.06 and 12.07.

29. 9/7/95 – Dr. Morris – Rates her as markedly limited in six out of eight of the Sustained Concentration and Persistence categories and moderately limited in the other two.

B. Female Organs

1. 2/7/92 – Senatobia Hospital – Fibroid uterus.
2. 2/25/92 – Senatobia Hospital – C-Section was done and she had multiple fibroids requiring bilateral partial salpingectomy.

C. Endocrine System

1. 2/7/92 – Senatobia Hospital – Thyroid enlargement.
2. 8/17/94 – Dr. Patel – Thyroid profile shows TSH low at .11, T4 high at 12.9 and Free Thyroxine Index high at 4.1.
3. 10/13/94 – Dr. Mayers – Has developed problems swallowing and sometimes talking.
4. 10/13/94 – Dr. Mayers – Thyroid is profusely enlarged.

D. Cardiovascular

1. 2/7/92 – Senatobia Hospital – Fetal and maternal tachycardia.
2. 2/7/92 – Senatobia Hospital – Had 1+ pitting edema of the lower extremities.
3. 2/25/92 – Senatobia Hospital – Had syncopal episodes with blood pressure dropping to 70/50.
4. 2/25/92 – Senatobia Hospital – 1+ pitting edema and puffiness of the face.
5. 2/25/92 – Senatobia Hospital – Has some superficial varicosities of the lower extremities.
6. 3/4/92 – Senatobia Hospital – Has 4+ pitting edema and diagnosis includes peripheral edema of feet and legs.

7. 8/15/94 – Dr. Patel – Chest x-ray revealed cardiomegaly.
8. 5/15/95 – dr. Patel – Echo showed LA to be slightly enlarged, aortic valve thickened, LV posterior wall thin and contraction poor with VIA motion abnormal.
9. 5/25/95 – Dr. Purdon – History of chest pain, shortness of breath and fatigue, with stress test negative and Echo fine.

E. Digestive

1. 2/7/92 – Senatobia Hospital – Is treated for hiatal hernia.
2. 2/7/92 – Senatobia Hospital – Diagnosis includes iron deficiency anemia.
3. 8/15/94 – Dr. Patel – Ultrasound showed cholelithlasis.

F. Hypertension

1. 2/25/92 – Senatobia Hospital – 130/90 in the office and by time of admission, 138/98.
2. 3/4/92 – Senatobia Hospital – 150/96.

G. Musculoskeletal

1. 3/4/92 – Senatobia Hospital – Reports numbness in the left hand.
2. 8/2/94 – Dr. Patel – Back pain since epidural for C-Section.
3. 8/2/04 – Dr. Patel – Is tender at L5-S1.
4. 8/2/94 – Dr. Patel – Carpal tunnel syndrome also indicated in these notes.
5. 8/15/94 – Dr. Patel – Lumbar spine x-ray revealed mild degenerative joint disease.

6. 10/13/94 – Dr. Mayers – Reports back pain since 1992, becoming progressively worse.

7. 10/13/94 – Dr. Mayers – Indicates she has constant back pain abut [sic] it becomes severe once a month and lasts for three to four days at which time she is bedridden for about 2 days, only getting up to the bathroom.

8. 10/13/94 – Dr. Mayers – The pain radiates into the posterior aspect of both legs, left worse than right.

9. 10/13/94 – Dr. Mayers – Left leg gives way sometimes when she is in severe pain.

10. 10/13/94 – Dr. Mayers – Back pain is aggravated by lifting, walking, standing or sitting.

11. 10/13/94 – Dr. Mayers – Can lift 10 pounds and carry it a short distance.

12. 10/13/94 – Dr. Mayers – Can walk one block and has to rest due to pain and shortness of breath.

13. 10/13/94 – Dr. Mayers – Can stand for 5 minutes.

14. 10/13/94 – Dr. Mayers – Can sit for 20 to 30 minutes if she has support of her back.

15. 10/13/94 – Dr. Mayers – Reports weakness in right arm extending from her shoulder to her hand and has decreased grip strength.

16. 10/13/94 – Dr. Mayers – Is able to bend 45 degrees and can rotate 80 degrees.

17. 10/13/94 – Dr. Mayers – Grip strength, pinch and key pinch are all 5/5 left and 3/5 right.

18. 10/13/94 – Dr. Mayers – Grasp ability good but slower on the right.

19. 10/13/94 – Dr. Mayers – There is vague tenderness in the lower lumbar area, more so on the right.

20. 10/13/94 – Dr. Mayers – Range of motion is 90 degrees forward bending, 20 degrees lateral bending bilaterally and she is able to extend 20 degrees.

21. 10/13/94 – Dr. Mayers – SLR is 80 degrees in the supine position and right SLR caused pain down the lateral aspect of the right thigh.

22. 10/13/94 – Dr. Mayers – SLR in the supine position is 40 degrees and this caused pain down the lateral aspect of the thigh.

23. 10/13/94 – Dr. Mayers – She has more pain on the left but findings on the right.

24. 10/13/94 – Dr. Mayers – Was able to squat about 3/4 of the way to the floor.

25. 10/13/94 – Dr. Mayers – Deep tendon reflexes were unobtainable.

26. 10/13/94 – Dr. Mayers – Reflexes from biceps, triceps, brachioradialis, knee jerks or ankle jerks could not be obtained.

27. 10/13/94 – Dr. Mayers – Pinprick is equal and normal except in the lateral aspect of the right lower leg, which corresponds with S1 dermatome.

28. 10/13/94 – Dr. Mayers – X-ray of the lumbar spine revealed narrowed interspaces of L3-L4 and L4-L5.

29. 10/13/94 – Dr. Mayers – A small density is demonstrated overlying the left side of the pelvis, most likely representing calcification within a small cyst.

POINTS OF LAW

1. ***SGA?*** – There has been no SGA since October, 1991 when her employment at Sunflower ended because of complications with her pregnancy.

2. ***Severe Impairment?*** – Obviously, this lady is severe even in the medical sense with her multitude of impairments in multiple areas of her body. Her most severe impairments appear to be in regard to her endocrine system and her musculoskeletal system, and these, in combination with her other impairments, have resulted in severe depression and anxiety which further impact her and cause her to become even more severe.

3. ***Meeting or Equaling a Listing?*** – This lady meets **Listing 12.04** with positive findings in regard to her depression including not only Dr. Morris' observations of her, but also positive testing on the IPAT Depression Scale, the BECK Depression Inventory and the MMPI, as well as from her reported symptoms on the Symptom Inventory Checklist. In regard to the sub elements, she has anhedonia, sleep disturbance, feelings of worthlessness, difficulty concentrating and thoughts of suicide. This would qualify her under **A-1 a., c., f., g. and h.**, and only four of those are required to meet this Listing. Dr. Morris also indicated that her combination of impairments have resulted in a marked restriction of activities of daily living, marked difficulties in maintaining social functioning and deficiencies of concentration, persistence or pace resulting in frequent failure to complete tasks in a timely manner. This would show the presence of three of the **B** elements and only two are required.

Because of the above, it is submitted that she meets **Listing 12.04 A-1 a., c., f., g. and h.**, with the presence of **B-1 through 3**.

Dr. Morris also found that she met **Listing 12.06** with positive testing on the IPAT Anxiety Scale and with his observations showing the presence of motor tension, autonomic hyperactivity, apprehensive expectation and vigilance and scanning. He also diagnosed panic disorder with agoraphobia. This would qualify her under **Listing 12.06 A-1 a., b., c., and d**. She probably also meets **A-3**, as on the Symptom Inventory Checklist, she reports that two to three times a week she experiences feelings of terror or panic. The B elements are discussed above under **Listing 12.04**, and show the presence of **B-1 through 3**.

Dr. Morris also indicates from his extensive observation and testing that she meets **Listing 12.07** and here, she would probably qualify under **A-1 and A-3**, and she also has **B 1 through 3** present, as discussed above.

4. ***Ability to Perform Past Relevant Work Activity?*** – Her past relevant work has been as a cashier, shipping clerk, crimper at an auto parts manufacturing company and as a sewing machine operator. All of these would probably be in the light category. With her severe back pain, it is felt she could no longer do the required lifting of these jobs nor the required standing and walking of these jobs. The sewing machine job would have been seated, but she cannot do the required sitting of that job. She also has the decreased grip strength in her right hand as well as slow grasp ability which would further impact her ability to do her past relevant work.

   Additionally, with the restrictions placed on Mrs. Sims by Dr. Morris, she would not be able to do jobs at any exertional level, as there is not a significant number of jobs that would allow such restrictions to an employee.

5. ***Performance of Other Forms of SGA?*** – This lady would have to be restricted to sedentary work, due to her back pain with radiation into her lower extremities which would restrict her in the lifting and the standing and walking of light or greater work. However, with her decreased grip strength in the right hand and slow grasp ability, it is felt that she does not have the bilateral manual dexterity to do the required work in a sedentary job. She also has numbness and weakness in her arms which has been diagnosed as carpal tunnel syndrome and this would further impact her ability to do the required bilateral manual dexterity of sedentary work and the required lifting, on a regular and sustained basis. The applicable Social Security Rulings would be **83-10 and 83-11,** and there would also be applicable **20 C.F.R. 404, Sub Part P, App. 2, Section 201.00 (h)**.

   Additionally, as noted above, with the restrictions placed on her by Dr. Morris after extensive testing and observation, particularly in the Concentration and Persistence categories, there are no jobs existing in the national economy in significant numbers for an individual with these restrictions.

For the above reasons, it is submitted that this lady be found disabled with a disability onset date as of her last day worked which would be October, not the first, 1991, as she has been unable to work since that date because of her multitude of impairments, now further impacted by her anxiety and depression.

Respectfully submitted:

/s/ Gary R. Parvin
GARY R. PARVIN
Rt. 2, Box 149C
Coffeeville, MS 38922
610-628-6648
Ms. Bar Number 4034

[SEAL]
DEPARTMENT OF HEALTH & HUMAN SERVICES
Social Security Administration

Refer to: 587-48-0484

Office of Hearings and Appeals
100 W. Capitol Street
McCoy Federal Bldg., Suite 1014
Jackson, MS 39269
Telephone:
Date: Mar 19 1996

NOTICE OF DECISION – UNFAVORABLE

Jautassa R. Sims
P.O. Box 208
Como, MS 38619

I have made the enclosed decision in your case. Please read this notice and the decision carefully.

If You Disagree With The Decision

If you do not agree with my decision, you may file an appeal with the Appeals Council.

How To File An Appeal

To file an appeal you or your representative must request the Appeals Council to review the decision. You must make the request in writing. You may use our Request for Review form, HA-520, or write a letter.

You may file your request at any local Social Security office or a hearing office. You may also mail your requests right to the Appeals Council, Office of Hearings and Appeals, 5107 Leesburg Pike, Falls Church, VA 22041-3255. Please put the Social Security number shown above on any appeal you file.

Time To File An Appeal

To file an appeal, you must file your request for review **within 60 days** from the date you get this notice.

The Appeals Council assumes you got the notice 5 days after the date shown above unless you show you did not get it within the 5-day period. The Council will dismiss a late request unless you show you had a good reason for not filing it on time.

Time To Submit New Evidence

You should submit any new evidence you wish to the Appeals Council to consider **with** your request for review.

How An Appeal Works

Our regulations state the rules the Appeals Council applies to decide whether to review a case and in reviewing a case. These rules appear in the Code of Federal Regulations, Title 20, Chapter III, Part 404 (Subpart J) and Part 416 (Subpart N).

If you file an appeal, the Council will consider all of my decision, even the parts with which you may agree. The

Council **will** review your case if one of the reasons for review listed in our regulations exists.

Requesting review places the entire record of your case before the Council. Review can make any part of my decision fully or partially favorable or unfavorable to you.

On review, the Council may itself consider the issues and decide your case. The Council may also send it back to an Administrative Law Judge for a new decision.

The Appeals Council Can Review The Decision On Its Own Motion

The Appeals council can review my decision even if you do not ask it to do so. If it decides to do that, the Council will mail you a notice about its review within 60 days from the date of this notice.

If No Appeal And No Review On The Appeals Council's Own Motion

If you do not appeal and the Council does not review my decision on its own motion, you will not have a right to court review. My decision will be a final decision that can be changed only under special rules.

New Application

You have the right to file a new application at any time, but filing a new application is not the same as appealing this decision. If you disagree with my decision and you file a new application instead of appealing, you might lose some benefits, or not qualify for any benefits. My

decision could also be used to deny a new application for insurance benefits, if the facts and issues are the same. So, if you disagree with this decision, you should file an appeal within 60 days.

Do You Have Any Questions?

If you have any questions, you may call, write of visit any Social Security office. If you visit an office, please bring this notice and decision with you. The telephone number of the local office that serves your area is (601) 227-8472. Its address is 784 East Govan Street (0B14), SUITE J (0B14), Grenada, MS. 38901.

Edward T. Morriss
Administrative Law Judge

Enclosures

cc:

Gary R. Parvin
Attorney at Law
Rt. 2, Box 149C
Coffeeville, MS 38922

DEPARTMENT OF
HEALTH AND HUMAN SERVICES
Social Security Administration
OFFICE OF HEARINGS AND APPEALS

DECISION

IN THE CASE OF	CLAIM FOR
	Period of Disability, Disability Insurance Benefits, and Supplemental Security Income
Jautassa R. Sims (Claimant)	
_____ (Wage Earner)	587-48-0484 (Social Security Number)

On August 3, 1994, the claimant protectively filed applications for a period of disability, disability insurance benefits, and supplemental security income. She alleges disability beginning April 1, 1992, due to degenerative joint disease of the lumbar spine and possible carpal tunnel syndrome. After initial and reconsideration denials, the claimant requested a hearing. A hearing was held before me on September 12, 1995, in Greenwood, Mississippi. The claimant and vocational expert Sam Cox appeared and testified. The claimant was represented by Gary Parvin, attorney at law.

ISSUES

The general issues are whether the claimant is entitled to a period of disability and disability insurance benefits under Sections 216(i) and 223, respectively, of the Social

Security Act, as amended; and whether the claimant is disabled under Section 1614(a)(3)(a) of the Act. The Social Security Act defines "disability" as the inability to engage in any substantial gainful activity due to physical or mental impairment(s) which can be expected to either result in death or last for a continuous period of not less than 12 months.

The specific issues are whether the claimant was under a "disability" and, if so, when such disability commenced and the duration thereof; and whether the disability insured status requirements of the Act are met for the purpose of entitlement to a period of disability and disability insurance benefits.

EVALUATION OF THE EVIDENCE

The claimant was born on April 27, 1951, and was forty years old on the alleged onset date, April 1, 1992. She has a high school education and has worked as a cashier in a food store, order clerk for a distribution center, crimper at an auto parts manufacturing plant, and worker at a hosiery mill and at a chair manufacturing plant. She met the disability insured statues requirements on April 1, 1992, the alleged onset date, and continued to meet them through December 31, 1995. She has not engaged in substantial gainful activity since the alleged onset date, April 1, 1992.

At the hearing on September 12, 1995, the claimant testified that on a typical day she got her son off to school, went back to bed, and her mother came over to get her three year old to care for at her house when the claimant had nervous attacks (approximately three times a week).

She stated that she cleaned one room at the time, watched some television, cooked on some days, did the washing with her daughter's help, and did some shopping. In describing her problems, she stated that she has back pain daily which began two months after the birth of her three year old son. She said that three times a month the pain is severe and she is unable to lift even ten pounds or walk as much as one fourth mile without having pain and shortness of breath. She was taking Naprosyn. In addition, the claimant stated that she has had very bad nerves and depression for twenty years, worse since 1992. She said that she has thought of "checking into" a mental health facility. According to the claimant, she has chest pain, rapid heart beat, sleeping problems, and thyroid problems. She stated that she used a heating pad for her back and that medications made her lightheaded. She said that her thyroid (gland) enlarged and felt like a "big lump" daily and that, if she got nervous, she rested for forty-five minutes to two hours. The claimant further testified that since March 1992 she has thought of suicide and has developed a plan. She said that she gained from 180 pounds to 224 pounds and had no energy. According to the claimant, no surgery has been suggested by the doctor who thought her problems would go away.

A review of the medical record shows that the claimant, when approximately eight months pregnant, was admitted to the hospital on February 7, 1992, for evaluation and further management of her pregnancy. She was given Macrodantin for a urinary tract infection and started on Inderal for fetal tachycardia. She began to feel much better and was discharged on February 9, 1992. On February 25, 1992, near the projected delivery date of her baby,

she was admitted to the hospital with abdominal pain and was found to have a fibroid uterus, urinary tract infection, anemia, and gestational diabetes. She was treated and on February 26, 1992, delivered a baby boy by Caesarean section under epidural anesthesia. She also underwent bilateral tubal ligation. She was discharged on March 1, 1992. On March 4, 1992, the claimant presented to the emergency room complaining of her feet swelling, elevated blood pressure, and numbness in her left hand. Her blood pressure was 150/96 and she had 4+ pitting edema in her feet and legs. Diagnoses were hypertension and peripheral edema. Lasix was administered intramuscularly and she was given a prescription for Maxzine (Exhibit 16).

Office notes from Dr. Patel show that the claimant was seen on August 2, 1994, complaining of lower back pain two times a month since she had an epidural for a C-section. She said that two months after the epidural she developed chills up and down her spine. Examination revealed thyroidmegaly and tenderness in the L5-S1 area of the back. The doctor noted possible carpal tunnel syndrome. He prescribed Bactrim, Synthroid, Naprosyn, and Zoloft. On August 15, 1994, the doctor's impression was mild degenerative joint disease of the lumbosacral spine (Exhibit 17).

Dr. William Mayers saw the claimant on October 13, 1994, for a consultative examination. Her chief complaints were of back pain, thyroid problem, and weakness in her right arm. The claimant stated that she had an epidural anesthetic in February 1992, her back pain started in April 1992, and she has had it every day since then. She said that it is severe about one time a month, lasts for three or

four days, and causes her to be bedridden. She stated that the pain radiated into both legs, the left worse than the right. She said that, when she did not have severe pain, the pain was aggravated by lifting, walking, standing, or sitting, and that she could lift ten pounds, walk only one block (due to pain in her back and shortness of breath), stand for five minutes, and sit for twenty to thirty minutes with support to her back. She was taking Aleve, two to three times a day, for her pack pain. She said that she could do her housework (taking her time) except for mopping. The claimant had an enlarged thyroid, present for five years. She was on Synthroid and said that, because of the enlargement, she had developed problems swallowing and sometimes had difficulty talking. She said that she had been told that the Synthroid might shrink her thyroid (gland) and she might be able to avoid surgery. Finally, she stated that the weakness in her right arm extended from her shoulder to her hand. She had no pain in her arm or hand unless she lifted something, and she had decreased grip strength in her right hand and occasionally dropped objects. Physical examination revealed height 5'4", weight 221 pounds, and blood pressure 131/79. Strength of the major muscle groups was 5/5 bilaterally. Grip strength was 5/5 on the left and 3/5 on the right. Straight leg raising was negative to 70 degrees on the left and was positive at 40 degrees on the right. Dr. Mayers commented that this was interesting because the claimant said she had more pain on the left when she had severe pain but on physical examination she had findings on the right. The claimant walked with a perceptible limp but did not use an assistive device. She was able to squat about three-fourths of the way but no further because of

pain in her back. She could arise from this position and heel and toe walk without difficulty. Cranial nerves II-XII were intact. Deep tendon reflexes were not obtainable and Dr. Mayers could not obtain a reflex from biceps, triceps, brachioradialis, knee jerks, or ankle jerks. Pinprick was equal and normal bilaterally except for the lateral aspect of her right lower leg, corresponding with S1 dermatome. She had no decreased sensation of the right upper extremity. Dr. Mayers' impressions were: back pain, etiology undetermined, possibly degenerative disc disease; diffuse thyroid enlargement; and weakness, right hand and arm, possibly carpal tunnel syndrome. A chest x-ray was normal. Lumbar spine x-ray showed degenerative disc disease at L3-4 and L4-5 and a partially calcified cyst overlying the left side of the pelvis (Exhibit 18).

Office notes dated May 15, 1995, from Dr. Patel show that an echocardiogram showed LA slightly enlarged, aortic valve not thick – excursion within normal limits, mitral valve normal, LV post wall thin and its contraction poor. Dr. Patel referred her to two specialists (Exhibit 19)

On May 25, 1995, Dr. J. S. Purdon, a cardiologist, saw the claimant on referral from Dr. Patel. The claimant complained of a history of chest pain and some shortness of breath and fatigue. Dr. Purdon noted that much of this might be deconditioning. Physical examination revealed height 5'5 ½ ", weight 224, and blood pressure 130/70. A stress exercise test was negative at 7 Mets energy expenditure and 94% of target heart rate. No arrhythmias were noted and after the test the claimant felt fine. Echocardiogram showed chamber sizes and left ventricular systolic function within normal limits. The mitral inflow pattern

was at most borderline for diastolic dysfunction. No valvular abnormalities were appreciated and there was no evidence of effusion. After a thorough examination, Dr. Purdon diagnosed chest pain felt to be chest wall pain, possible element of reflux disease, hypothyroidism on treatment, and exogenous obesity. He commented the claimant's work-up was really negative for any sort of cardiac pain. He started her on Indocin 25 mg three times a day for five days, Pepcid 20 mg two times a day, and Flexeril one at bedtime for ten days (Exhibit 26).

On September 7, 1995, the claimant was seen by Dr. Joe Edward Morris, a psychologist, on referral from her representative, attorney Gary Parvin. On the Wechsler Adult Intelligence Scale-Revised (WAIS-R), the claimant obtained verbal, performance, and full scale IQ scores of 83, 72, and 81, respectively, which place her in the borderline range of intellectual functioning. On the Wide Range Achievement Test-Revised (WRAT-R), the claimant's scores on reading, spelling, and arithmetic were beginning of eleventh grade, beginning of eleventh grade, and beginning of tenth grade, respectively. These scores were somewhat higher than those on the WAIS-R and more within the average range. Dr. Morris stated that, cognitively, the claimant was able to understand and follow simple instructions and perform simple calculations. He said that she had symptoms of panic disorder and that she might have difficulty interacting with coworkers and receiving supervision because of her emotional instability. He diagnosed panic disorder with agoraphobia (provisional); major depressive disorder, recurring, severe, without psychotic features, without

interepisode recovery; undifferentiated somatoform disorder; borderline intellectual functioning; history of gestational diabetes, fibroid uterus, thyroid enlargement, carpal tunnel syndrome, and back pain (Exhibit 27).

After reviewing the evidence, I find that the claimant has "severe" impairments, degenerative disc disease of the lumbar spine, thyroid enlargement, possible carpal tunnel syndrome, exogenous obesity, depression, borderline intellectual functioning, and somatoform disorder. A psychiatric Review Technique form has been completed and is appended to the decision. It properly addresses the claimant's diagnoses of depression at section 12.04, borderline intelligence at 12.05, panic disorder at 12.06, and somatoform disorder at 12.07. In evaluating the severity of the impairments under the "B" criteria of the Listings, I find that the claimant has moderate restriction of activities of daily living; moderate difficulty in maintaining social functioning; mild to moderate difficulties with concentration and attention; and that she has never had episodes of deterioration in job settings. Although Dr. Morris diagnosed panic disorder, in his summary of the claimant's daily activities he stated that she was able to drive a car short distances, go to the store, do light shopping, use the telephone, watch television, read mysteries, keep up with the news, and handle money – indicating that if she does have panic disorder, it is not marked. I do not credit Dr. Morris' finding of severe major depression as there is no history of mental health treatment as would be expected for such a severe case of depression. Dr. Morris stated that the claimant's concentration and attention "appear to be at least markedly affected." However, he also stated that the claimant was

"cooperative and task oriented with good task persistence and completion." I acknowledge that her depression may cause moderate difficulties with functioning including mild to moderate difficulty with concentration and attention. The Claimant has back pain which she has attributed to an epidural she received during a Caesarean section in 1992. However, there has been no consistent treatment for this and no evidence of a serious back problem from the consultative examination. Regarding her enlarged thyroid, the doctor has not suggested surgery and has stated that he believed that with medication the thyroid gland problem would go away. The claimant has not had a positive diagnosis of carpal tunnel syndrome by electromyography. Based on the record, her mental impairments and physical impairments do not meet or equal a listing in Appendix 1.

The claimant's impairments prevent her from performing some basic work activities such as lifting heavy weights and doing work that involves a high level of concentration. However, I find that she is able to perform a reduced range of light work. In reaching this conclusion, I have specifically considered the claimant's subjective complaints, including pain. I considered the provisions of Regulations 404.1529 and 416.929, which stipulate that the effects of all symptoms, including pain, must be evaluated on the basis of a medically determinable impairment which can be expected to produce such symptoms. Further, I considered the provisions of Social Security Ruling 95-5p. Social Security Ruling 95-5p provides that all symptoms be considered in regard to their possible impact on the claimant's ability to function.

The claimant's daily activities, as described above in the report of the consultative examination by Dr. Mayers, in Dr. Morris' report, and at the hearing, indicate that the claimant's activities are only moderately restricted. The claimant is able to do household chores except mopping. Even though she has slightly decreased strength in her right hand, she can open a jar lid (if not tight), twist a doorknob, zip zippers, and button buttons. She had no joint tenderness of either hand. Range of motion of shoulders and elbows was full and strength in major muscle groups was 5/5 bilaterally. Although she could only squat three-fourths of the way down, she could heel and toe walk without difficulty and needed no assistive device for ambulating. As mentioned, there has been no consistent treatment for back trouble and there was no evidence of a serious back problem from the consultative examination. The heart specialist reported that the claimant's workup was negative for any sort of cardiac pain. According to the claimant's list of medications (undated), the claimant is taking Zoloft one a day for depression, Synthroid one a day for thyroid, and Advil and Aleve as needed for back pain. At the hearing, the claimant stated that she takes Naprosyn for back pain and that it makes her "lightheaded." However, there is no record of the claimant's complaining to doctors of adverse side effects of her medication. Based on the entire record, I find that the claimant's subjective complaints of pain and disability are not credible to the extent alleged.

At the hearing, vocational expert Sam Cox testified that the claimant's past work as a cashier/stock person was medium, semi-skilled; as an order picker/clerk was medium, unskilled; and as a clerk was medium, semi-

skilled. When presented with a hypothetical question posing an individual forty-four years old, with a twelfth grade education, able to do light work, with mild to moderate difficulty with concentration/attention due to pain, and moderate difficulty functioning due to depression, Mr. Cox stated that there are jobs that such an individual can do. He identified several representative suitable jobs in the light category and the their approximate incidence: counter attendant (unskilled), 410,000 in the nation, 5,000 in the state; cashier/checker (semi-skilled), 531,000 in the nation, 6500 in the state; and general office clerk (unskilled), 2,248,000 in the nation, 18,000 in the state. As to the cashier/checker job, the vocational expert testified that skills would transfer from claimant's past work.

Based on the claimant's chronic back pain and diagnoses of degenerative disc disease and possible carpal tunnel syndrome, I find that she would not be able to return to her past relevant work because the exertional demands of the work exceed her present residual functional capacity. When a claimant establishes that she cannot perform her past relevant work because of her impairments or because she has no past relevant work, the burden shifts to the Secretary to show that the claimant can perform a significant number of jobs existing in the national economy which are consistent with her medically determinable impairments, functional limitations, age, education, and work experience. The vocational expert identified a number of such jobs in the light exertional category above.

Accordingly, I find that claimant Jautassa R. Sims is not disabled, within the meaning of the Social Security Act.

FINDINGS

After careful consideration of the entire record, I make the following findings:

1. The claimant met the disability insured status requirements of the Act on April 1, 1992, the date the claimant stated became unable to work, and continues to meet them through December 31, 1995.

2. The claimant has not engaged in substantial activity since April 1, 1992.

3. The medical evidence establishes that the claimant has "severe" impairments, degenerative disc disease, thyroid enlargement, possible carpal tunnel syndrome, exogenous obesity, depression, borderline intelligence, and somatoform disorder, but that she does not have an impairment or combination of impairments listed in, or medically equal to one listed in Appendix 1, Subpart P, Regulations No. 4.

4. The claimant's subjective complaints of pain and limitation are not credible to the extent alleged.

5. The claimant has the residual functional capacity to perform the physical exertion and nonexertional requirements of work except for being unable to lift more than 20 pounds and being unable to perform jobs precluded by mild to moderate difficulties with concentration and attention (20 CFR 404.1545 and 416.945).

6. The claimant is unable to perform her past relevant work as cashier/stock person or order picker/clerk.

7. The claimant's residual functional capacity for the full range of light work is reduced by being unable to perform work precluded by mild to moderate difficulties with concentration and attention.

8. On the alleged onset date, April 1, 1992, the claimant was 40 years old (now 44), which is defined as a younger person (20 CFR 404.1563 and 416.963).

9. The claimant has a high school education (20 CFR 404.1564 and 416.964).

10. Based on an exertional capacity for light work and the claimant's age, education, and work experience, the vocational expert identified jobs that she could perform.

12. The claimant was not under a "disability," as defined in the Social Security Act, at any time through the date of this decision (20 CFR 404.1520(f) and 416.920(f)).

DECISION

It is my decision that, based on the application protectively filed on August 3, 1994, the claimant is not entitled to a period of disability or disability insurance benefits under sections 216(i) and 223, respectively, of the Social Security Act, and is not eligible for supplemental security income under sections 1602 and 1614(a) (3) (A) of the Act.

/s/ Edward T. Morriss
Edward T. Morriss
Administrative Law Judge

MAR 19, 1996
Date

OHA PSYCHIATRIC REVIEW TECHNIQUE FORM

NAME: Jautassa R. Sims SSN: 587-48-0484

Assessment is for: Current Evaluation

Administrative Law Judge's Signature Date

/s/ Edward T. Morriss MAR 19 1996

I. MEDICAL SUMMARY

A. Medical Disposition(s): RFC Assessment Necessary (i.e., a severe impairment is present which does not meet or equal a listed impairment)

B. Based Upon Category(ies): 12.04, 12.05, 12.06, 12.07

II. Reviewer's Notes (Does not apply to OHA)

III. DOCUMENTATION OF FACTORS THAT EVIDENCE THE DISORDER (Evaluation of the existence of a sign or symptom CLUSTER or SYNDROME for the Listed Disorder.)

PRESENT	ABSENT			
[ ]	[x]	A.	12.02	Organic Mental Disorders
[ ]	[x]	B.	12.03	Schizophrenic, Paranoid and other Psychotic Disorders
[x]	[ ]	C.	12.04	Affective Disorders
[x]	[ ]	D.	12.05	Mental Retardation and Autism
[x]	[ ]	E.	12.06	Anxiety Related Disorders

[x]	[ ]	F.	12.07	Somatoform Disorders
[ ]	[x]	G.	12.08	Personality Disorders
[ ]	[x]	H.	12.09	Substance Addiction Disorders

C. **12.04 Affective Disorders** – Disturbance of mood, accompanied by a full or partial manic or depressive syndrome, as evidenced by at least one of the following:

PRESENT-ABSENT-INSUFFICIENT EVIDENCE

1. [ ] [x] [ ] Depressive syndrome characterized by at least four of the following:
   - a. [ ] Anhedonia or pervasive loss of interest in almost all activities, or
   - b. [ ] Appetite disturbance with change in weight, or
   - c. [ ] Sleep disturbance, or
   - d. [ ] Psychomotor agitation or retardation, or
   - e. [ ] Decreased energy, or
   - f. [ ] Feelings of guilt or worthlessness, or
   - g. [ ] Difficulty concentrating or thinking, or
   - h. [ ] Thoughts of suicide, or
   - i. [ ] Hallucinations, delusions or paranoid thinking

2. [ ] [x] [ ] Manic syndrome characterized by at least three of the following:
   - a. [ ] Hyperactivity, or
   - b. [ ] Pressures of speech, or
   - c. [ ] Flight of ideas, or
   - d. [ ] Inflated self-esteem, or

e. [ ] Decreased need for sleep, or
f. [ ] Easy distractibility, or
g. [ ] Involvement in activities that have a high probability of painful consequences which are not recognized, or
h. [ ] Hallucinations, delusions or paranoid thinking

3. [ ] [x] [ ] Bipolar syndrome with a history of episodic periods manifested by the full symptomatic picture of both manic and depressive syndromes (and currently characterized by either or both syndromes)

4. [x] [ ] [ ] Other: depression

D. **12.05 Mental Retardation and Autism** – Significantly subaverage general intellectual functioning with deficits in adaptive behavior initially manifested during the development period (before age 22), or pervasive developmental disorder characterized by social and significant communicative deficits originating in the developmental period, as evidenced by at least one of the following:

PRESENT-ABSENT-INSUFFICIENT EVIDENCE

1. [ ] [x] [ ] Mental incapacity evidenced by dependence upon others for personal needs (e.g., toileting, eating, dressing or bathing) and inability to follow directions, such that the use of standardized measures of intellectual functioning is precluded*
2. [ ] [x] [ ] A valid verbal, performance, or full scale I.Q. of 59 or less*

3. [ ] [x] [ ] A valid verbal, performance, or full scale I.Q. of 60 to 70 inclusive and a physical or other mental impairment imposing additional and significant work-related limitation of function*
4. [ ] [x] [ ] A valid verbal, performance or full scale I.Q. of 60 to 70 inclusive or in the case of autism, gross deficits of social and communicative skills*
5. [x] [ ] [ ] Other: borderline intelligence

* NOTE: Items 1,2,3, and 4 correspond to Listings 12.05A, 12.05B, 12.05C, and 12.05D, respectively.

E. **12.06 Anxiety Related Disorders** – Anxiety as the predominant disturbance or anxiety experienced in the attempt to master symptoms, as evidenced by at least one of the following:

PRESENT-ABSENT-INSUFFICIENT EVIDENCE

1. [ ] [x] [ ] Generalized persistent anxiety accompanied by three of the following:
   a. [ ] Motor tension, or
   b. [ ] Autonomic hyperactivity, or
   c. [ ] Apprehensive expectation, or
   d. [ ] Vigilance and scanning
2. [ ] [x] [ ] A persistent irrational fear of a specific object, activity or situation which results in a compelling desire to avoid the dreaded object, activity, or situation
3. [ ] [x] [ ] Recurrent severe panic attacks manifested by a sudden unpredictable onset of intense apprehension, fear, terror, and sense of impending doom

occurring on the average of at least once a week

4. [ ] [x] [ ] Recurrent obsessions or compulsions which are a source of marked distress
5. [ ] [x] [ ] Recurrent and intrusive recollections of a traumatic experience, which are a source of marked distress
6. [x] [ ] [ ] Other: some symptoms of panic disorder

F. **12.07 Somatoform Disorders** – Physical symptoms for which there are no demonstrable organic findings or known physiological mechanisms, as evidenced by at least one of the following:

PRESENT-ABSENT-INSUFFICIENT EVIDENCE

1. [ ] [x] [ ] A history of multiple physical symptoms of several years duration beginning before age 30, that have caused the individual to take medicine frequently, see a physician often and alter life patterns significantly

2. [ ] [x] [ ] Persistent nonorganic disturbance of one of the following:

   a. [ ] Vision, or
   b. [ ] Speech, or
   c. [ ] Hearing, or
   d. [ ] Use of a limb, or
   e. [ ] Movement and its control (e.g., coordination disturbances, psychogenic seizures, akinesia, dyskinesia), or
   f. [ ] Sensation (e.g., diminished or heightened)

3. [ ] [x] [ ] Unrealistic interpretation of physical signs or sensations associated with the preoccupation or belief that one has a serious disease or injury

4. [x] [ ] [ ] Other: focusing on and overexaggeration of somatic symptoms

IV. RATING OF IMPAIRMENT SEVERITY

A. "B" CRITERIA OF THE LISTINGS

THE FOLLOWING FUNCTIONAL LIMITATIONS (WHICH APPLY TO PARAGRAPH B OF LISTINGS 12.02-12.04 AND 12.06-12.08 AND PARAGRAPH D OF 12.05) EXIST AS A RESULT OF THE INDIVIDUAL'S MENTAL DISORDER(S).

NOTE: ITEMS 3 AND 4 BELOW ARE MORE THAN MEASURES OF FREQUENCY. DURATION AND EFFECTS OF THE DEFICIENCIES (ITEM 3) OR EPISODES (ITEM 4) ARE DISCUSSED IN THE DECISION.

Listing(s) under which the items below are being rated: 12.04, 12.05, 12.06, 12.07

FUNCTIONAL LIMITATION AND DEGREE OF LIMITATION

1. Restrictions of Activities of Daily Living:

None [ ] Slight [ ] Moderate [x] Marked* [ ] Extreme [ ] Insuff Evid [ ]

2. Difficulties in Maintaining Social Functioning:

None [ ] Slight [ ] Moderate [x] Marked* [ ] Extreme [ ] Insuff Evid [ ]

---

3. Deficiencies of Concentration, Persistence or Pace Resulting in Failure to Complete Tasks in a Timely Manner (in work settings or elsewhere):

Never [ ] Seldom [ ] Often [x] Frequent* [ ] Constant [ ] Insuff Evid [ ]

---

4. Episodes of Deterioration or Decompensation in Work or Work-Like Settings Which Cause the Individual to Withdraw from that Situation or to Experience Exacerbation of Signs and Symptoms (which may Include Deterioration of Adaptive Behaviors):

Never [x] Once/Twice [ ] Repeated* (3+) [ ] Continual [ ] Insuff Evid [ ]

---

*Degree of limitation that satisfies the Listings: Extreme, Constant and Continual also satisfy that requirement.

B. Summary of Functional Limitation Rating for "B" Criteria

NO. OF FUNCTIONAL LIMITATIONS MANIFESTED AT THE LISTING LEVEL: [0] (The number must be at least 2 to satisfy the requirements of paragraph B in Listings 12.02, 12.03, 12.04 and 12.06 and paragraph D in 12.05; and at least 3 to satisfy the requirements in paragraph B in Listings 12.07 and 12.08.)

C. "C" Criteria of the Listings

2. If 12.06 Disorder (Anxiety Related)

PRESENT-ABSENT-INSUFFICIENT EVIDENCE

[ ] [x] [ ] Symptoms resulting in **complete** inability to function independently outside the area of one's home.

(If present is checked, the requirements in paragraph C of 12.06 are satisfied.)

[LOGO]
GARY R. PARVIN

ATTORNEY AT LAW
ROUTE 2, BOX 149C - COFFEEVILLE, MS 38922
1-800-748-8914 628-6648
September 12, 1996

Appeals Council
Office of Hearings & Appeals
5107 Leesburg Pike
Falls Church, VA 22041-3255

Re: Jautassa R. Sims SSN: 587-48-0484

Dear Ladies and Gentlemen:

On September 11, 1996, I received a call from Diane Shaw of the Grenada, Mississippi Social Security Office, indicating that Jautassa Sims, my client, had contacted her for the status on her case. Jautassa informed her that she had contacted your office and was informed that no appeal was ever made, and that her file had been shipped back to the Grenada, MS Social Security Office. Ms. Shaw then queried her computer and found that the file had, in fact, been shipped back to Grenada, MS and she also located the file in her office, with no appeal being included. I now enclose a copy of my copy of the March 26, 1996 letter/memorandum appealing the denial of Honorable Edward T. Morriss. I am now signing this copy, just as I did the original. I also enclose a Mailing Certificate from my Executive Secretary, Elizabeth Jobe, indicating that she did mail the letter/memorandum on March 26, 1996.

Apparently, my appeal letter was lost in the mail, or was misplaced in your mail room, as I understand that you have a huge backlog of cases.

I am this date mailing my client a Certificate indicating that she did receive her copy of the Appeal Letter shortly after March 26, 1996, allowing for mailing time, since we mailed her a copy of what we sent you. I will mail that to you as soon as received.

Please consider the Appeal Letter enclosed and forward your decision in due course.

Very truly yours,

/s/ Gary R. Parvin
GARY R. PARVIN

GRP/eaj
CC: Jautassa Sims
Diane Shaw, Grenada, MS SSA

[LOGO]
GARY R. PARVIN

ATTORNEY AT LAW
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1-800-748-8914 628-6648
March 26, 1996

Appeals Council
Office of Hearings & Appeals
5107 Leesburg Pike
Falls Church, VA 22041-3255

Re: Jautassa R. Sims

SSN: 587-48-0484

Dear Ladies and Gentlemen:

I now appeal to you the unfavorable decision of March 19, 1996, entered by Honorable Edward T. Morriss,

Administrative Law Judge, of the Jackson, Mississippi OHA.

In reference to the claimant's mental dysfunctioning, the relevant Exhibits are Exhibits 16, 18 and 27. Exhibit 16 is relevant because it shows, potentially, a memory impairment in reference to an entry of February 7, 1992, in which Senatobia Hospital notes that the claimant is pregnant, but she cannot tell them when she had her last period. It is further relevant in its note that she has not been compliant with office visits and its further note [sic] that she has gestational diabetes and is not compliant with her diet, as these two notes show a lack of judgment, at the very least, and taking all three of these notes together, the same would constitute the beginning evidence for the later conclusion of a serious mental disorder which is known to impact memory and which is known to impact judgment.

Then, there is the Senatobia Hospital note of February 25, 1992, also in Exhibit 16, that she is nervous and depressed and that she is extremely anxious and depressed.

The Administrative Law Judge ignored all five of the above entries from Exhibit 16, not mentioning them, whatsoever in his opinion.

Further, from Exhibit 18, on October 13, 1993, in Dr. Mayer's consultative examination on this case, he finds it significant that she has more pain on the left, but positive findings on the right. What could possibly explain that?

It is too easy to say that she is faking it or malingering it or incredible, because a serious mental illness can just as

easily cause that finding by Dr. Mayers, and that is the obvious somatoform disorder.

Then, the undersigned had the claimant go to Dr. Joe Edward Morris, because he is an approved consultative examiner of the Commissioner, while also being the most extensive in his testing and reporting, known to the undersigned. In reference to her anxiety, Exhibit 27, constituting Dr. Morris' report, notes her somewhat rigid posture and her number of nervous mannerisms in regard to wringing of her hands, rubbing her arm and rubbing her eyes, all of which would be evidence in regard to an anxiety disorder. He also notes her nervous laughter from time to time and indicates that this appears to be her masking a rather severe depression. In regard to her functioning, she does not attend church and belongs to no community groups and does not actively seek contact with people outside of her home, all of which is further evidence of one or more serious mental disorders. He further states that her overall emotional state was one of severe depression with mostly constricted affect, which was punctuated with the aforementioned nervous laughter, at times. She even told Dr. Morris that she had to laugh to cover up all the bad things that are going on. In regard to her sleep disturbance, she wakens frequently due to nervousness and averages about 5 hours of sleep each night. She admitted to him in regard to her suicidal thoughts and Dr. Morris strongly encouraged her to seek help at her local mental health center. She did report explosive outbursts on a daily basis and Dr. Morris observed that her psychomotor activity was sluggish.

Further, from Exhibit 27, Dr. Morris reports her Verbal IQ at 83, Performance IQ at 72 and Full Scale IQ at 81 with the Achievement Test Scores consistent with that.

Had this been the usual testing that DDS arranges in the State of Mississippi, testing would have ended with the IQ and Achievement Testing; however, because he was doing this at the request of the undersigned, those constraints were not applied and he was to do the indicated testing thereafter. In doing so, he administered the MMPI, which this individual was able to complete, because of her intellectual functioning being high enough to allow such. Her profile is reported to be indicative of depression with numerous somatic complaints as well as indicative of withdrawal and poor reality testing, all of which is obviously indicating one or more severe mental disorders.

Dr. Morris did not stop with the MMPI, nor the Achievement Testing, nor the IQ testing, but proceeded to administer the IPAT Depression Scale, and here, her score of 10, with that being the highest score allowed, shows very high levels of depression.

Dr. Morris did not stop there, as depression was not the only indicated item from his examination and from the other records already mentioned herein, and he thereby also administered the IPAT Anxiety Scale and there, she scored the highest score, again, which is a 10, indicative of very high levels of anxiety.

Dr. Morris did not stop there, as he wanted to give another depression test, and did so, in reference to the BECK Depression Scale. Here, she scored a 50, which is in the very severe range.

Consistent with the previously reported portion of this examination, and his testing, her daily symptoms, reported by her, are nervousness, problems sleeping, irritability, lack of interest in sex, family, social and recreational activities, depression, crying spells, feelings of worthlessness and difficulties in concentration. All of those symptoms, daily, are known symptoms of a severe anxiety disorder or a severe depressive disorder. If that were not so, they would not be listed as such, as required elements in Listing 12.04, nor 12.06.

Further, consistent with the anxiety observations and the anxiety scoring, above, she reports that two or three times a week, she experiences feelings of terror or panic. In other words, a report of such symptom, by a person who does not have the anxiety observations by Dr. Morris, previously stated above, and who does not have the anxiety testing results, previously reported above, should receive no credibility, but one with all of the above, in conjunction with that reported symptom, has thereby shown the proof for why the symptom is present. Dr. Morris went on to indicate that she had, obviously, symptoms of panic disorder. He also reported that she seems to be easily frustrated with very low frustration tolerance, in reference to his observation of her during the testing and examination.

Further, consistent with her lack of judgment and marked concentration and attention deficits, which Dr. Morris found, she even failed to keep her first appointment with Dr. Morris, but reported to him that she was ill at that time, but the fact is she did not call him, nor the undersigned's office to report the same so that it could be

rescheduled. This was done when Dr. Morris called the undersigned's office.

Based upon his extensive examination, observation and testing, Dr. Morris diagnoses panic disorder with agoraphobia (Provisional), major depressive disorder, recurrent, severe, without psychotic features, without interepisode recovery, rule out somatization disorder, and undifferentiated somatoform disorder, all on Axis I. He further diagnoses borderline intellectual functioning on Axis II. On Axis III, he notes the other medical history, for the same was provided him by the undersigned in regard to the actual records or the undersigned's Medical Summary that is within Exhibit 23. That Summary, when provided to him, would not have included, on his testing of September 7, 1995, obviously his own reporting of such testing, as is constituted in the Summary within Exhibit 27 in the claim file, since that was delivered to the Administrative Law Judge, after Dr. Morris' testing and reporting, on the date of the hearing.

Dr. Morris then reports that it is his opinion that she meets Listing 12.04 due to her depression with sleep disturbance, feelings of worthlessness, difficulties concentrating or thinking, and thoughts of suicide, and that she meets Listing 12.06, in his opinion, because of her panic attacks and because of her motor tension, autonomic hyperactivity, apprehensive expectation, along with vigilance and scanning, both of which, that is, depression and anxiety, have caused her to meet the required B elements in reference to having a marked restriction of activities of daily living, marked difficulties in maintaining social functioning and deficiencies of concentration,

persistence or pace resulting in frequent failure to complete tasks in a timely manner.

In reference to her somatoform disorder, he states his opinion that she probably meets that because of her history of multiple physical symptoms of several years duration that began before she reached age 30.

The Administrative Law Judge gives a one half page, one paragraph, report of Dr. Morris' Exhibit on the bottom half of page 5 of his opinion. It is significant for what it does not mention from that report. It does not mention the MMPI testing, it does not mention the IPAT Depression Scale Score, it does not mention the IPAT Anxiety Scale Score, it does not mention the BECK depression Scale Score, it does not mention the Daily Symptoms, and it does not mention the weekly symptoms, nor does it give an accurate representation of the balance of what is in Dr. Morris' report. In fact, the Administrative Law Judge basically accepted the IQ scores and the Achievement Testing and ignored the balance of it, which was his first error, as, he could not ignore the other testing and the rest of the report, and come to the same conclusion that he did. In other words, the undersigned is stating that the ALJ first erred by ignoring significant portions of Dr. Morris' testing and reporting which were necessary to not be ignored, in order to get the appropriate picture, that is, an accurate picture of the suffering of this individual and the causation of such suffering, mentally. The second error was that the Administrative Law Judge, after ignoring the most important and significant portions of the testing and reporting, then substituted his opinion, as a layman, for that of the expert, Dr. Joe E. Morris, who is not only recognized as an expert by the

undersigned, but is also recognized as one, by the Commissioner, as an approved consultative examiner for mental disorders and mental functioning.

The Administrative Law Judge further ignored the significance of the notes first mentioned above from Senatobia Hospital on February 27, 1992, within Exhibit 16, showing the potential of a memory impairment and the potential of a lack of judgment, as well as the entries of February 25, 1992, in that same Exhibit, that actually stated that it was their observation that she was nervous, extremely anxious and depressed, which obviously points directly toward the eventual testing that was done by Dr. Morris in reference to her anxiety and in reference to her depression. The somatoform disorder was indicated as a possibility, by Dr. Mayers, in Exhibit 18, with his observation that she had more pain on the left, but more findings on the right, which the Judge, as a layman, decided to accept that, in the face of Dr. Morris' extensive reporting and testing, to be evidence to be a liar, malingerer, or a less than credible person. Had he not been such a layman, but an expert in the field, he would have recognized that this was an indication of a potential for a somatoform disorder under Listing 12.07.

In other words, the indicated testing, on a careful review of the existing record, which was done by Dr. Morris, was certainly indicated in the two separate Senatobia Hospital records and strongly implied, from Dr. Mayers' examination on that comment mentioned above. The fact that the testing then was consistent, in results, with what had already been observed and stated, at 2 different medical sources, is not to be ignored by the undersigned, but, was

ignored by the ALJ, and that, along with his other ignoring, shows why, and how, he justified substituting his opinion for that of Dr. Morris.

The undersigned realizes that the Judge then went through his justification on page 6 of his opinion, while continuing to ignore the significant testing and other portions of the report of Dr. Morris, as stated above. A careful reading of his justification on page 6 will show you, the undersigned believes, that he is simply substituting his opinion for that of Dr. Morris and simply making findings consistent with those required in order to cause a denial of the case, which was the result he wanted to reach, for whatever reason. The undersigned believes it was because he did not pay proper attention, and give proper weight, to the other relevant testing and reporting by Dr. Morris. For instance, he does not "credit Dr. Morris' finding of severe major depression as there is no history of mental health treatment as would be expected for such a severe case of depression (page 6 of ALJ opinion)." That is a classic example of an opinion substitution, by a layman for an expert. The fact that she had no prior history of mental health treatment is, to experts in the field, as explained to the undersigned, the potential for just the opposite conclusion from the ALJ. In fact, it is well known among experts that the most seriously mentally ill have no appreciation or understanding of their illness and that this is reflected in their not seeking treatment, because they have no judgment and do not know, comprehend, or understand, that they need such treatment. Often, it is only through the intervention of family members or friends that such occurs. This lady was basically avoiding everyone with her withdrawn

nature, as a result of her illnesses, and was bothering no one, committing no crimes, had no psychosis, and was not one that would automatically receive such intervention from family members, friends or law enforcement.

One does not have to be so seriously mentally ill that they are in need of obvious inpatient treatment to qualify under Listings 12.04, 12.06 or 12.07, from the very elements that they state, but that appears to be the standard that the ALJ is indicating, potentially.

On the official SSA-4734-F4-SUP form of the Social Security Administration, Dr. Morris shows, within Exhibit 27, that Jautassa Sims is markedly limited in her ability to carry out detailed instructions, markedly limited in her ability to maintain attention and concentration for extended periods, markedly limited in the ability to perform activities within a schedule, maintain regular attendance, and be punctual within customary tolerances, markedly limited in the ability to sustain an ordinary routine without supervision, markedly limited in the ability to work in coordination or proximity to others without being distracted by them, and markedly limited in the ability to complete a normal workday and workweek without interruptions from psychologically based symptoms and to perform at a consistent pace without an unreasonable number and length of rest periods, and that she is markedly limited in her restriction of activities of daily living, has marked difficulties in maintaining social functioning, and frequently has deficiencies of concentration, persistence or pace resulting in failure to complete tasks in a timely manner (in work settings or elsewhere) and that she, once or twice, had episodes of deterioration or decompensation in work-like settings causing her to

withdraw from that situation or to experience an exacerbation of signs and symptoms (which may include deterioration of adaptive behaviors).

Contrary to that, the ALJ, in substituting his opinion, changed the marked findings to moderate on page 6 of his opinion in reference to activities of daily living, social functioning and gave a mild to moderate conclusion on concentration and attention, and found that she had never had episodes of deterioration in job settings. The episodes of deterioration that sub part B-4 of the Listings requires is not restricted only to job settings, but this shows, that once again, he ignored portions of it and thereby applied a different standard than that which is directed by the appropriate Regulations. This was in addition to substituting his opinion for those of the approved consultative examiner for the Commissioner, as well as he did it in this case in reference to the request of the undersigned, without limitations on testing. Additionally, he ignored most of the other marked findings mentioned above that Dr. Morris had, all of which was based upon his total examination, observation and testing of her for several hours in length and his review of the other records or the undersigned's Summary of them in the claim file.

The Administrative Law Judge, still on page 6, goes on to then indicate, by perceiving certain selected portions from Dr. Morris' report, that she was not any more than moderately restricted in her daily living activities, by reporting what Dr. Morris included in his report from the self report of the claimant. This ignores, again, the overall impact of the entire report, examination and testing. The fact is that Dr. Morris is the one who is more qualified to

make a marked finding versus a moderate one, or to make a moderate one versus a marked one, than a lay ALJ, which also would apply to the undersigned as a lay attorney. The fact that she would engage in the activities as Dr. Morris reported, does not justify the ALJ in concluding a moderate restriction of activities of daily living versus a marked one, for the frequency in which she engages in them, and her pace in engaging in them, should also be considered, and that is obviously what Dr. Morris did, as a direct result of his testing, examination and observation of her for several hours.

The ALJ then goes on with another classic substitution justification, for a lay opinion to be substituted for the expert opinion, in reference to his justification on the concentration and attention to be changed from marked to mild to moderate by indicating that since she was "cooperative and task oriented with good task persistence and completion" with Dr. Morris, that she could not be any more than mildly to moderately impacted in her concentration and attention. Again, this ignores the full import of the examination, observation and testing by Dr. Morris over several hours, and is attempting to say that in that one situation that may last three hours in length, that because she could do that then, with specific instructions from the undersigned to do her best so that the testing would be valid, and to cooperate with Dr. Morris, so that the testing would be valid, that she could do this for 8 hours a day, 5 days a week, and for longer than three months, at the least, for a successful work attempt, even, is an unsupported substitution of a lay opinion by a layman for that of the expert, for it does not so flow, even with common sense reasoning.

In the ultimate, this denial decision is a direct result of a lay Administrative Law Judge substituting his opinion for that of the recognized expert of the Commissioner and of the undersigned, and in so doing, he has used improper reasoning that does not even hold up to the test of "common sense" which even laymen can have and can use.

Further, Jautassa Sims suffers from, as the ALJ finding number 3, on page 8 states a severe impairment in reference to degenerative disc disease, a severe impairment in reference to thyroid enlargement, a severe impairment in reference to possible carpal tunnel syndrome, a severe impairment in reference to exogenous obesity, a severe impairment in reference to her depression, a severe impairment in reference to borderline intelligence, and a severe impairment in reference to her somatoform disorder, but this was never posed to the Vocational Expert by the Administrative Law Judge in his hypotheticals. The hypothetical upon which he relies begins at the bottom of page 7 and goes to the top of page 8 of his opinion and basically restricts the hypothetical individual of 44 years of age with a 12th grade education to be able to do light work with mild to moderate difficulty with concentration/attention due to pain, and moderate difficulty functioning due to depression. This ignored what he indicated at the top of page 7 when he found that she was able to perform a reduced range of light work, but states in the hypothetical that she is able to do light work, which strongly implies the full range since it is not reduced or stated to be reduced. Further, his finding 5 is inconsistent as it recognizes only the inability to lift more than 20 pounds and the inability to perform jobs precluded by

mild to moderate difficulties with concentration and attention.

Further, the required OHA Psychiatric Review Technique form shows that, in reference to concentration deficiencies, on page 6 of the same, he chose often, meaning that she often has deficiencies of concentration, persistence or pace resulting in failure to complete tasks in a timely manner (in work settings or elsewhere).The hypotheticals of the ALJ did not include that specific finding and are therefore not proper and are a legal standard violation in regard to the Act, the Regulations, and relevant Circuit Court Decisions.

Further, none of his hypotheticals included all of the conditions from which she suffered, not even all of those that he recognizes in his finding number 3 as severe, which is another obvious error. Further, his finding of only thyroid enlargement is incorrect as Exhibit 16 does show that on February 7, 1992, but Exhibit 17 on August 17, 1994, shows her thyroid profile to be low on one item and high on two others, so she actually has been suffering from a thyroid disease of some kind. Exhibit 18 shows some slight impact that might be occurring, if she was at work, with her report to Dr. Mayers of her having problems swallowing and talking, sometimes, and he finds that the thyroid is profusely enlarged at that point, which could explain the causation for those very symptoms that she complained of, for which she is given absolutely no credit by the ALJ. Additionally, he gave her no credit for her digestive limitations noted in Exhibits 16 and 17, respectively, as hiatal hernia, iron deficiency anemia, and cholelithiasis.

Further, he gives no real credit to Jautassa Sims for her back pain radiating to the lower extremities versus a somatoform disorder causing the same pain, which is just as severe and disabling as that caused by a back disorder that is physical, and this is in spite of Dr. Morris' extensive testing, examination and reporting and in spite of Dr. Mayers' statement in reference to his findings on one side when her worst pain is on the other side. The ALJ gave her no credit for her reporting to Dr. Mayers of her lifting limit of 10 pounds and her walking distance of one block, her standing limitation of 5 minutes and her sitting limitation of 20 to 30 minutes with support of her back, gave her no credit for her reported weakness in the right arm as she told Dr. Mayers, although he found grip strength, pinch and key pinch 40% reduced on the right, with a 3/5 rating, while the left was completely normal at 5/5, as it should be. He gave her no credit for her grasp ability on the right being slower, that Dr. Mayers also found. He also gave her no credit for her right straight leg raising causing pain down the lateral aspect of the right thigh, as observed by Dr. Mayers, and he gave no credit for her being unable to squat more than $^{3}/_{4}$th's of the way to the floor as reported by Dr. Mayers. Further, he gave no mention or credit to the fact that Dr. Mayers reports that the deep tendon reflexes were unobtainable, and that the same was true also in the upper extremities and lower extremities.

The ALJ gave no credit, nor real mention, to Dr. Mayers' finding (Exhibit 18) that although the pin prick was equal and normal, in most places, it was not in the lateral aspect of the right lower leg, corresponding with the S1 dermatome. If degenerative disc disease, is a finding, and

would include Dr. Mayers' x-ray report showing narrowed interspaces at L3-L4 and L4-L5, then the undersigned would not have much compiaint there, but it is the overall weight of the report of Dr. Mayers, even, that the ALJ also ignores as far as its import, when he then indicates that this lady, 5 days a week and 8 hours a day can do light work with the maladies that she suffers from either in her musculoskeletal system, or in her mental functioning, or both, with the somatoform disorder absolutely explaining the pain and the limitations she would have in her physical system, if the physical testing does not support it, but in her case, it is obviously a mixed bag, potentially as a result of a combination of factors so that the physical testing is not really complete, even now. For instance, this individual, without any income and without any Medicaid or other medical insurance coverage, cannot receive the same sort of testing and treatment that the ALJ and the undersigned can, for she has no way to obtain it without income, and without medical insurance. The undersigned's experience has been that whenever a well meaning doctor requests such at a hospital, for a person without insurance and without the ability to pay, the hospital refuses to do the MRI and the more expensive tests, as well as a myelogram, and may even refuse to do one simple x-ray, much less flexion and extension x-rays. In that vein, the entire import of the ALJ opinion, in addition to being to substitute his lay opinion for that of Dr. Morris, and to selectively perceive only that from Dr. Mayers' report which agrees with him, and ignore that which does not, and then to use the lack of treatment of the claimant as his justification for her lack

of credibility, partially, is simply not applying the proper standard that exists within the 5th Circuit.

For authority in regard to the ALJ substituting his lay opinion for that of the experts, please see: ***ALLEN V. SCHEWIKER*** [sic], 567 F.Supp. 1204 (D. Del. 1983), ***BUCK V. HECKLER***, No. 81-372 (D. Vt. 1983) cited in Unempl. Ins. Rep. (CCH), 15,256, ***CRESS V. HECKLER***, 579 F.Supp. 644 (E.D. Pa. 1984), ***EIDEN V. SECRETARY OF H.E.W.***, 616 F.2d 63 (2d Cir. 1980), ***FOWLER V. CALIFANO***, 596 F.2d 600 (3d Cir. 1979), ***QUINONES V. SECRETARY OF H.H.S.***, 567 F.Supp. 188 (E.D. N.Y. 1983), ***STEFFANICK V. HECKLER***, 570 F.Supp. 420 (D. Md. 1983), ***TRESSLER V. SCHWEIKER***, No. 82-1106 (M.D. Pa. 1983) cited in Unempl. Ins. Rep. (CCH), New Matter, 15,059, ***VAN HORN V. SCHWEIKER***, 717 F.2d 871 (3d. Cir. 1983), ***WELLACE V. SECRETARY OF H.H.S.***, 722 F.2d 1150 (3d Cir. 1983), ***SMITH V. CALIFANO***, 637 F.2d 968 (3d. Cir. 1981), ***LUND V. WEINBERGER***, 520 F.2d 782 (8th Cir. 1975), ***WILSON V. CALIFANO***, 617 F.2d 1595 (4th Cir. 1980), ***KENT V. SCHWEIKER***, 710 F.2d 110 (3d. Cir. 1983), ***GOVER V. MATHEWS***, 574 F.2d 772 (3d. Cir. 1978), ***SCHAAF V. MATHEWS***, 574 F.2d 157 (3d. Cir. 1978), ***LEWIS V. CALIFANO***, 616 F.2d 73 (3d. Cir. 1980), ***KLUG V. WEINBERGER***, 514 F.2d 423 (8th Cir. 1975), ***GRABLE V. SECRETARY OF H.E.W.***, 442 F.Supp. 465 (W.D. N.Y. 1977), ***ALBRIGHT V. SCHWEIKER***, No. 91-C-3151 (N.D. Ill. 1982) cited in Unempl. Ins. Rep. (CCH), Transfer Binder for February-December, 1983, 14,624, ***ROOT V. HECKLER***, 618 F.Supp. 76 (D. Del. 1985), ***SOUZA V. HECKLER***, 622 F.Supp. 182 (D.R.I. 1985), ***GILLILAND V. HECKLER***, 786 F.2d 178 (3d Cir. 1986), ***OPPENHEIM V. FINCH***, 495 F.2d 396, 397 (4th Cir. 1974), ***MCLAIN V.***

SCHWEIKER, 715 F.2d 866, 869 (4th Cir. 1983), ***NEVAREZ V. SECRETARY OF H.H.S.***, 603 F.Supp. 1032 (D.P.R. 1985), ***GRIMMET V. HECKLER***, 607 F.Supp. 502 (S.D. W. Va. 1985), ***BUTTRON V. HECKLER***, 610 F.Supp. 763 (S.D. N.Y. 1985), ***ROUSEY V. HECKLER***, 771 F.2d 1065 (7th Cir. 1985), and ***DRAGUN V. HECKLER***, 603 F.Supp. 813 (W.D. Pa. 1985). In regard to his relying on the fact that she did not seek treatment for her conditions as a basis for denying her, this very same situation occurred in reference to a Jackson, Mississippi OHA case called ***LOVELACE V. BOWEN***, and it appears that the Jackson OHA will never learn the lesson of it, as judged from this and other opinions received by the undersigned from that office. The case is ***LOVELACE V. BOWEN***, 813 F.2d 55 (5th Cir. 1987). The case finds that where the claimant cannot afford prescribed treatment or medicine, and can find no way to obtain it, the condition that is disabling in fact, continues to be disabling in law. It went on to state that "The medicine or treatment an indigent person cannot afford is no more a cure for his condition that [sic] if it had never been discovered." (813 F.2d 59) The Court went on, in explanation for that quote, to indicate that decisions to that effect had already been rendered in the 4th, 8th and 10th Circuits, and then stated the obvious, when it says "To a poor person, a medicine that he cannot afford to buy does not exist" (813 F.2d 59), and then went on to state that to hold otherwise "ignores economic reality" (813 F.2d 59). In other words, the undersigned is saying if the ALJ cannot deny her because she can't get the treatment that will cure her, it is inconsistent to say that he can deny her when she did not get the treatment that would not have cured her, but would have better

documented her case, when the same is not available to her as a poor person, with no income and with no insurance to pay for such testing or treatment. Further, the ALJ, in doing as he did with Dr. Morris' extensive testing, reporting and examination, excluded the properly determinable mental impairment in violation of 5th Circuit Law as shown in the cases of ***FORD V. SECRETARY OF H. H. S.***, 659 F.2d 66 (5th Cir. 1981) and ***STRICKLAND V. HARRIS***, 615 F.2d 1103 (5th Cir. 1980).

Although the list of argued errors could continue on and on, the undersigned will only submit one other, and that is that this case was decided at Step 5, where the burden of proof has shifted to the Commissioner. The methodology used here, by the ALJ, of substituting his opinion for that of the Commissioner's and the undersigned's expert, Dr. Morris, while selectively perceiving only that portion of Dr. Mayers' exam, as the Commissioner's consultative examiner, that he agreed with, while ignoring the other portions that he did not agree with, as a basis for satisfying the shifted burden of proof, is totally out of line with the requirements of the Regulations and the applicable Circuit Court decisions, such as, from the 5th Circuit in which this case was heard, ***HERRON V. BOWEN***, 788 F.2d 1127 (5th Cir. 1986).

Respectfully submitted:

/s/ Gary R. Parvin
GARY R. PARVIN
Ms. Bar Number 4034

GRP/eaj

cc: Juatassa Sims

CERTIFICATE

This is to certify that I mailed the appeal letter dated March 26, 1996, on March 26, 1996, postage prepaid to Appeals Council, Office of Hearings and Appeals, 5107 Leesburg Pike, Falls Church, VA 22041-3255.

/s/ Elizabeth Jobe
Elizabeth Jobe
Executive Secretary to
Honorable Gary R. Parvin

(LOGO) SOCIAL SECURITY ADMINISTRATION

Refer to: TAHBP
587-48-0484

Office of Hearings and Appeals
5107 Leesburg Pike
Falls Church, VA 22041-3255

MAY 13 1997

ACTION OF APPEALS COUNCIL
ON REQUEST FOR REVIEW

Mrs. Jautassa Sims
P. O. Box 208
Como, MS 38619

Dear Mrs. Sims:

The Appeals Council has considered the request for review of the Administrative Law Judge's decision issued on March 19, 1996.

Social Security Administration regulations provide that the Appeals Council will grant a request for review where: (1) there appears to be an abuse of discretion by the Administrative Law Judge; (2) there is an error of law; (3) the Administrative Law Judge's action, findings, or conclusions are not supported by substantial evidence; or (4) there is a broad policy or procedural issue which may affect the general public interest. The regulations also provide that where new and material evidence is submitted with the request for review, the entire record will be evaluated and review will be granted where the Appeals Council finds that the Administrative Law Judge's actions, findings, or conclusion is contrary to the weight of the evidence currently of record (20 CFR 404.970 and 416.1470).

The Appeals Council has concluded that there is no basis under the above regulations for granting your request for review. Accordingly, your request is denied and the Administrative Law Judge's decision stands as the final decision of the Commissioner of Social Security in your case. In reaching this conclusion, the Appeals Council has considered the applicable statutes, regulations, and rulings in effect as of the date of this action.

The Appeals Council has also considered the contentions raised in your representative's letter dated March 26, 1996, but concluded that the contentions do not provide a basis for changing the Administrative Law Judge's decision.

If you desire a court review of the Administrative Law Judge's decision, you may commence a civil action by filing a complaint in the United States District Court for the judicial district in which you reside within sixty (60) days from the date of the receipt of this letter. It will be presumed that this letter is received within five (5) days after the date shown above unless a reasonable showing to the contrary is made. The complaint should name the Commissioner of Social Security as the defendant and should include the Social Security number(s) shown at the top of this notice. The right to court review is provided for in sections 205(g) and 1631(c)(3) of the Social Security Act, as amended (42 U.S.C. 405(g) and 1383(c)(3)).

If you cannot file your complaint within 60 days, you may ask the Appeals Council to extend the time in which you may begin a civil action. However, the Council will only extend the time if you provide a good reason for not

meeting the deadline. Your reason(s) must be set forth clearly in your request.

If a civil action is commenced, the Commissioner must be served by sending a copy of the summons and complaint by registered or certified mail to the General Counsel, Social Security Administration, Room 611, Altmeyer Building, 6401 Security Boulevard, Baltimore, MD 21235. (See rules 4(c) and (i) of the Federal Rules of Civil Procedure). In addition, you must serve the United States Attorney for the district in which you file your complaint and the Attorney General of the United States, as provided in the Federal Rules of Civil Procedure.

Sincerely yours,

ORIGINAL SIGNED BY
Peter N. Dowd
Administrative Appeals Judge

cc:
Gary R. Parvin

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
DELTA DIVISION

JUATASSA SIMS, Plaintiff

v. No. 2:97CV094-B-B

COMMISSIONER OF SOCIAL
SECURITY, Defendant

REPORT AND RECOMMENDATIONS

(Filed Nov. 25, 1997)

On November 20, 1997 oral argument was heard by the magistrate judge in the above entitled action at Oxford pursuant to 28 U.S.C. §636(b)(4) and Local Rule M-5(c), at which plaintiff and defendant Commissioner were represented by their respective counsel.

This matter is before the court on an application by the plaintiff seeking judicial review under 42 U.S.C. §405(g) of the final decision of the Commissioner of Social Security denying her claims for disability insurance benefits under Title II of the Social Security Act and supplemental security income disability benefits under Title XVI.

The record shows that the plaintiff was born on April 27, 1951; that she has a high school education; and that her work experience has been as a cashier in a food store, order clerk at a distribution center, crimper at an auto parts manufacturer, and factory work at a hosiery mill and chair manufacturing plant. She has coverage for purposes of the special earnings requirement of Title II of the Act through December 31, 1995. The plaintiff last worked

on April 1, 1992, her claimed onset date of disability as a result of anxiety/panic disorder, depression, thyroid enlargement, cardiovascular system impairment, digestive system impairment, hypertension, degenerative joint disease in her lumbar spine, and carpal tunnel syndrome.

FINDINGS OF THE ALJ

Applying the sequential evaluation process, 20 C.F.R. §404.1520 (1992), the Administrative Law Judge (ALJ) found that plaintiff has not engaged in substantial gainful activity since April 1, 1992, and that the medical evidence establishes that plaintiff has degenerative disc disease of the lumbar spine, thyroid enlargement, possible carpal tunnel syndrome, exogenous obesity, depression, borderline intellectual functioning, and somatoform disorder, but that these impairments do not meet the listings.

The ALJ found that the plaintiff has the residual functional capacity to perform the exertional and nonexertional requirements of a reduced range of light work activity, reduced by mild to moderate difficulties with concentration and attention; and that plaintiff is unable to perform her past relevant work as a cashier/stock person or order picker/clerk. Having found the plaintiff unable to perform her past relevant work, the burden shifts to the Commissioner to show that she can perform a significant number of jobs existing in the national economy. Based on vocational expert testimony, it was concluded that plaintiff could perform such jobs as counter attendant, cashier/checker, general officer [sic] clerk. (Findings, TR 12-21).

LAW AND ARGUMENT

The court's review is limited to whether or not substantial evidence supports the Commissioner's decision *Richardson v. Perales*, 402 U.S. 389 (1971). Substantial evidence must be "more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Id.*, at 401. Conflicts in the evidence are to be resolved by the Commissioner – if there is substantial evidence to support the Commissioner's decision then the decision must be affirmed, even if there is evidence in the record which may support a contrary result. *Selders v. Sullivan*, 914 F.2d 614, 617 (5 Cir. 1990).

The Commissioner must apply a five-step sequential evaluation process to determine if a claimant is capable of engaging in substantial gainful activity: (1) a claimant who is working will not be found disabled no matter what the medical findings are; (2) a claimant will not be found disabled unless he has a severe impairment; (3) a claimant whose impairment meets or equals an impairment listed in Appendix 1 of the regulations will be found disabled regardless of vocational factors; (4) a claimant who is capable of performing her prior relevant work will not be found disabled; and (5) if the claimant cannot perform her prior relevant work as a result of her impairment, then factors such as her age, education, past work experience and residual functional capacity must be considered to determine whether she can do other work. *Villa v. Sullivan*, 895 F.2d 1019, 1022 (5 Cir. 1990). A finding that the claimant is or is not disabled at any step of the process terminates the evaluation. *Harrell v. Bowen*, 862 F.2d 471, 475 (5 Cir. 1988). The burden of proof is on

the claimant for the first four steps, and then shifts to the Commissioner at step five. *Anderson v. Sullivan*, 887 F.2d 630, 632-33 (5 Cir. 1989).

At the hearing, plaintiff's primary contention was that there was only one examination and report of plaintiff's mental condition, that of Dr. Morris, and therefore the ALJ should have adopted his findings of marked limitations rather than substitute his own lay opinion. Counsel for the plaintiff also argued that contrary to the Commissioner's assertion that Dr. Morris was the only person noting a mental condition, the record contains several references to a mental problem – TR 120, 132, 146, and 155.

The Commissioner argued at the hearing that there was other evidence to support the ALJ's finding that plaintiff had only slight to moderate limitations from her mental conditions. For instance, plaintiff indicated throughout her papers that she is disabled because of her back pain which began with the epidural administered at her son's birth (TR 68, 191). She has never sought any mental health treatment despite her contention that she is completely debilitated by depression and panic disorder. Although she contends that she cannot afford such treatment, and that she does not receive Medicaid (TR 210-211), she does not indicate that she ever sought such treatment. Further, as discussed in the Commissioner's brief, the extent of plaintiff's treatment history consists of her hospitalization for the cesarean birth of her child in early 1992, three office visits with Dr. Pravin P. Patel, a general practitioner, and a one time cardiac consultative examination with Dr. J.S. Purdon. There is no record of any prior treatment for a mental condition, and Dr. Joe Ed

Morris, who is the only examiner to note a mental impairment, has a documented history with Social Security of making similar findings for claimants referred by plaintiff's attorney.

The court also notes that Dr. Morris' finding that plaintiff is borderline mentally retarded does not comport with the rest of the record. For instance, Dr. Mayers found plaintiff to be cooperative, and to answer questions intelligently (TR 124). Plaintiff's testimony at the hearing was articulate, informed and intelligent (TR 177-217). Plaintiff even described herself as "smart" (TR 154, 209). This evidence contradicts Dr. Morris' finding and test results that she is suffering from borderline IQ and provides substantial evidence from which the ALJ could make a determination that her IQ is higher than the test implies. *See Muse v. Sullivan*, 925 F.2d 785 (5 Cir. 1991) (ALJ can determine IQ tests to be invalid if evidence supports that determination).

Thus, Dr. Morris' findings are controverted by other evidence, and the ALJ did not err in finding that only part of Dr. Morris' report should be adopted.

Other arguments raised in the briefs, but not argued at the hearing shall be addressed as follows.

Selected Use of the Record

Plaintiff complains that the ALJ selectively ignored the many references throughout the record to plaintiff's mental condition, particularly those set forth in Dr. Morris' report. Plaintiff contends that the ALJ ignored Dr. Morris' findings regarding her anxiety and depression.

The ALJ accepted Dr. Morris' findings of severe depression, somatoform disorder, and borderline intellectual functioning (TR 17). However, the ALJ rejected the severity and degree of limitation found by Dr. Morris because plaintiff had never been treated for depression as one would expect if it were as severe as Dr. Morris' found (TR 17). Further, despite Dr. Morris' findings regarding plaintiff's IQ, plaintiff reported that she was a straight "A" student throughout school (TR 154), and was described as "intelligent" by at least one observer (TR 64), and had a past work history of jobs requiring average intelligence (TR 189-190). This evidence is inconsistent with Dr. Morris' findings and belies plaintiff's claim that the ALJ selectively ignored the evidence.

Consultative Examination

Plaintiff contends that peculiarities in the medical evidence, particularly found in Dr. Mayers' report, should have alerted the ALJ to the necessity of ordering a consultative examination to explore the possibility of somatoform disorder as a cause for the irregularities, citing *Latham v. Shalala*, 36 F.3d 431 (5 Cir. 1994). Particularly, plaintiff states that Dr. Mayers' report that plaintiff complained of more pain on the left side of her body, but the objective findings indicated a weakness on the right, should have alerted the ALJ to a possible somatoform disorder.

The ALJ is not required to order consultative examinations unless the plaintiff has raised "the requisite suspicion" that the examination is necessary to discharge his responsibility to fully develop the record. *Haywood v.*

Sullivan, 888 F.2d 1463, 1472 (5 Cir. 1989). The ALJ is not required to investigate all possible disabilities. *Leggett v. Chater*, 67 F.3d 558, 566 (5 Cir. 1995). Further, the ALJ has complete discretion over whether or not additional tests or medical evidence are necessary and a consultative examination is not required unless "the evidence as a whole, both medical and nonmedical, is not sufficient to support a decision . . . " 20 C.F.R. §404.1519a; *Anderson v. Sullivan*, 887 F.2d 630, 634 (5 Cir. 1987).

Defective Hypothetical

Plaintiff argues that the ALJ found plaintiff's conditions of degenerative disc disease, thyroid enlargement, carpal tunnel syndrome, obesity, depression, borderline intelligence, and somatoform as severe impairments, but did not pose these impairments in the form of a hypothetical to the vocational expert.

Whether or not the Commissioner carried the burden of proof at this step in the process depends upon the validity of the hypothetical questions posed to the vocational expert and whether the questions reasonably incorporated the disabilities recognized by the ALJ. *See Morris v. Bowen*, 864 F.2d 333, 336 (5 Cir. 1988). The Fifth Circuit has recently articulated a test for determining whether or not a defective hypothetical may constitute reversible error as follows:

> "Unless the hypothetical question posed to the vocational expert by the ALJ can be said to incorporate reasonably all disabilities of the claimant recognized by the ALJ, and the claimant or his representative is afforded the opportunity to correct deficiencies in the ALJ's

> questions by mentioning or suggesting to the vocational expert any purported defects in the hypothetical questions (including additional disabilities not recognized by the ALJ's findings and disabilities recognized but omitted from he [sic] question), a determination of non-disability based on such a defective question cannot stand."

Bowling v. Shalala, 36 F.3d 431, 436 (5 Cir. 1994).

The first hypothetical posed to the VE was as follows:

> "Assume I find the claimant is 44 years old. And a 12th grade education. And assume I find she can perform light work. And – okay. Assume I find a mild to moderate difficulty with concentration and attention due to pain. She has moderate difficulty functioning due to depression and anxiety. Under that hypothetical, are there any jobs she could perform?"

(TR 214). The vocational expert answered that there were a number of jobs and listed them with the numbers available in the national economy (TR 214). The other two hypothetical questions added severe difficulty with concentration due to pain, depression and anxiety and the VE responded that no jobs would be available to her. Plaintiff's counsel was present and could have added all of her claimed disabilities, regardless of what the ALJ ultimately found to be severe impairments, yet counsel posed no questions to the VE.

The ALJ is not a Medical Expert

This argument is simply a different slant on plaintiff's complaints that the report of Dr. Morris should have

been adopted in its entirety. The regulations grant the ALJ considerable discretion in his review of the medical evidence, and where as here there is substantial evidence to support a decision contrary to one of plaintiff's physicians, this court must affirm it.

It is therefore recommended that the decision of the Commissioner be affirmed and the complaint dismissed with prejudice.

The parties are referred to Local Rule M-3(a) for the applicable procedure in the event any party desires to file objections to the findings and recommendations herein contained. The parties are warned that any such objections are required to be in writing and must be filed within ten days of this date. Failure to timely file written objections to the proposed findings, conclusions and recommendations contained in this report will bar an aggrieved party, except upon grounds of plain error, from attacking on appeal unobjected-to proposed factual findings and legal conclusions accepted by the district court. *Douglass v. United Services Automobile Association*, 79 F.3d 1415 (5 Cir. 1996).

Respectfully submitted, this the 24th day of November,

/s/ Eugene M. Bogen
UNITED STATE
MAGISTRATE JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
DELTA DIVISION

JUATASSA SIMS

Plaintiff

NO. 2:97CV94-B-B

V.

KENNETH S. APFEL,
Commissioner of Social Security

Defendant

FINAL JUDGMENT

(Filed Jan. 12, 1999)

Upon consideration of the file and records in this case, the court finds that the report and recommendation of the United States Magistrate Judge dated November 24, 1997, was on that date duly served by regular mail upon counsel of record for the plaintiff and the defendant. On December 11, 1997, this court received an objection to the Magistrate Judge's report and recommendation from the plaintiff. Upon due consideration, the court finds that the plaintiff's objection is without merit and that the report and recommendation of the United States Magistrate Judge should be approved and adopted as the opinion of the court. It is therefore ORDERED:

> that the report and recommendation of the United States Magistrate Judge dated November 24, 1997, is approved and adopted as the opinion of the court, and that the proposed findings of fact and conclusions of law therein set out are adopted as the findings of fact and conclusions of law of the court; and

that the final decision of the Commissioner of Social Security is affirmed, and that this action is dismissed with prejudice.

THIS, the 9th, day of January, 1998.

/s/ Neal B. Biggers, Jr.
NEAL B. BIGGERS, JR.
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 98-60126
Summary Calendar

JUATASSA SIMS,

Plaintiff-Appellant,

versus

KENNETH S. APFEL,
COMMISSIONER OF SOCIAL SECURITY,

Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Mississippi
USDC No. 2:97-CV-94-B

(Filed Nov. 6, 1998)

Before POLITZ, Chief Judge, STEWART and PARKER, Circuit Judges.

PER CURIAM:*

*Pursuant to 5TH CIR. R. 47.5, the Court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

Juatassa Sims appeals the district court's affirmance of the Commissioner's denial of her application for disability insurance benefits, contending that the administrative law judge: (1) failed to afford proper weight to a psychologist's opinion that she was severely depressed; (2) improperly excluded certain of her impairments in assessing her residual function capacity; and (3) should have ordered a consultative examination to assess her mental impairments. We affirm.

We lack jurisdiction to review Sims's second and third contentions because they were not raised before the Appeals Council.[1] The first contention is without merit because the ALJ is entitled and expected to determine the credibility of medical experts and to weigh their opinions accordingly.[2] Concluding that the findings of the ALJ are supported by substantial evidence, the judgment appealed is AFFIRMED.[3]

---

[1] **Paul v. Shalala,** 29 F.3d 208 (5th Cir. 1994).

[2] **Greenspan v. Shalala,** 38 F.3d 232 (5th Cir. 1994).

[3] **Villa v. Sullivan,** 895 F.2d 1019 (5th Cir. 1990).

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 98-60126

JUATASSA SIMS

Plaintiff - Appellant

v.

KENNETH S APPEL, COMMISSIONER
OF SOCIAL SECURITY

Defendant - Appellee

Appeal from the United States District Court for the
Northern District of Mississippi, Oxford

ON PETITION FOR REHEARING

(Filed Feb. 18, 1999)

Before POLITZ, Chief Judge, STEWART and PARKER, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above case is denied.

ENTERED FOR THE COURT:

/s/ Henry A. Politz
Chief Judge

Supreme Court of the United States

No. 98-9537

Juatassa Sims,

Petitioner

v.

Kenneth S. Apfel, Commissioner of Social Security

ON PETITION FOR WRIT OF CERTIORARI to the United States Court of Appeals for the Fifth Circuit.

ON CONSIDERATION of the motion for leave to proceed herein in forma pauperis and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed in forma pauperis be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted.

November 29, 1999

Jan 20 2000 (1)

Supreme Court, U.S.
FILED
JAN 20 2000
CLERK

No. 98-9537

In The

Supreme Court of the United States

JUATASSA SIMS,

Petitioner,

vs.

KENNETH S. APFEL,
Commissioner of Social Security,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF FOR PETITIONER

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QUESTION PRESENTED

May a federal court, without any statutory or regulatory authority in support thereof, and contrary to the informal, non-adversarial nature of the social security administrative adjudicative process, impose an issue exhaustion requirement upon social security claimants in federal court to bar issues that were not specifically raised by the claimant during the administrative process?

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OPINIONS BELOW

The district court's January 9, 1998 unpublished final judgment adopting the Report and Recommendation of the United States Magistrate Judge appear in the Joint Appendix ("J.A.") at 74-84. The Fifth Circuit's unpublished opinion and order dated November 6, 1998 and unpublished order denying the Petition for Rehearing, dated February 18, 1999, appear at J.A. 85-86 and 87 respectively.

GROUNDS FOR JURISDICTION

The Petitioner's Petition for a W*rit of Certiorari* was timely filed within ninety days of the Fifth Circuit's denial of her Petition for Rehearing. The Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTES AND REGULATORY PROVISIONS INVOLVED

Pertinent statutory and regulatory provisions are set forth in the appendix attached hereto.

STATEMENT OF THE CASE

Social Security determinations are governed by procedures coordinated by the Social Security Administration ("SSA") and, in disability cases, assisted by state governments. *See Bowen v. City of New York*, 476 U.S. 467, 472 (1986). The initial determination is generally made by a state agency acting under the authority and control of the SSA in accordance with 42 U.S.C. §§ 421(a), 1383b(a). If the claim is denied initially, the claimant may pursue a three stage administrative review process. First, the decision is reconsidered *de novo* pursuant to 20 C.F.R. §§ 404.909(a), 416.1409(a) (1999) (hereinafter 1999 will be omitted). Second, the claimant is entitled to a hearing before an administrative law judge ("ALJ") in accordance with 42 U.S.C. §§ 405(b)(1) and 1383(c)(1). Third, the claimant may seek review by the Appeals Council. *See* 20 C.F.R. §§ 404.967,

416.146[illegible]. After exhausting these steps in the administrative process, the claimant may seek judicial review of that final decision in federal district court pursuant to 42 U.S.C. §§ 405(g) and 1383(c)(3).

Although the Social Security Act ("the Act") does not create an Appeals Council, the SSA established the Appeals Council in 1940. The Appeals Council presently is comprised of twenty administrative appeals judges who determine whether to grant "review" of cases appealed by claimants who are dissatisfied with their ALJ decisions. In the vast majority of cases, the Appeals Council denies the request for review, resulting in the ALJ's decision becoming the SSA's final decision on the claimant's application. *See* 20 C.F.R. §§ 404.981, 416.1481. By way of background, the Appeals Council does not function like a true administrative appeal tribunal but more like an informal, non-adversarial complaint bureau. It receives over 112,000 requests for review each year. Non-lawyer analysts perform the predominant review functions and it is prohibited from applying case law. Its denials of review generally take the form of boilerplate letters which do not respond to any of the issues or arguments raised. The SSA provides claimants with a one-page form to request Appeals Council review, which contains only a three-line space for the statement of issues and arguments.[1]

On August 18, 1994, Ms. Sims filed applications for disability insurance benefits under Title II of the Act and Supplemental Security Income benefits under Title XVI of the Act. Her claims for benefits were denied initially and before the ALJ. The record includes a letter by her attorney and submitted to the ALJ which discussed the relevant medical

[1] *See* Section C2. pages 33 to 38, *infra*, discussing the Appeals Council's functions and operating reality in detail. *See generally*, Charles H. Koch & David A. Koplow, *The Fourth Bite at the Apple: A Study of the Operation and Utility of the Social Security Administration's Appeals Council*, 17 Fla. St. L. Rev. 199 (1990). The SSA's general authority to establish an Appeals Council derives from 42 U.S.C. §§ 405(b)(1), 1383(c)(3). *See id.* at 231-32 and n.177.

evidence and "points of law" supporting her entitlement to benefits. *See* J.A. at 8-24. Ms. Sims requested review of the ALJ's decision by the Appeals Council on March 26, 1996. Her attorney submitted a letter to the Appeals Council arguing that the ALJ erred in the analysis of her various impairments and their effect on her ability to function. *See* J.A. at 70. The Appeals Council denied her request for review on May 13, 1997, rendering the ALJ's decision the SSA's final decision.

On May 23, 1997, Ms. Sims filed a complaint in the district court seeking review of the SSA's final decision. On November 24, 1997, the United States Magistrate Judge issued a Report and Recommendation recommending affirmance of the SSA's decision. *See* J.A. at 74-82. Ms. Sims subsequently filed objections to the Report and Recommendation. She argued that the Report and Recommendation was flawed because the U.S. Magistrate Judge should have found that the SSA: (1) failed to accord proper weight to the uncontroverted medical opinion of a consulting psychologist; (2) improperly evaluated her residual functional capacity;[2] (3) failed to consider all of her impairments; and (4) failed to develop a full and fair record by ordering a consultative examination. On January 9, 1998, the district court entered a final judgment adopting the Report and Recommendation which considered all the issues raised by the parties on the merits and which did not apply issue exhaustion principles.

[2] This Court previously has examined the importance of the residual functional capacity ("RFC") assessment in SSA disability cases:

> [The RFC] assessment measures the claimant's capacity to engage in basic work activities. If the claimant's RFC permits him to perform his prior work, benefits are denied. If the claimant is not capable of doing his past work, a decision is made under the fifth and final step, whether, in light of his RFC, age, education and work experience, he has the capacity to perform other work. If he does not, benefits are awarded.

City of New York v. Bowen, 476 U.S. 467, 471 (1986) (regulatory citations omitted).

Ms. Sims filed a Notice of Appeal of the Final Judgment. She asserted three arguments in support of her appeal: (1) the Commissioner erred in according inadequate weight to the uncontroverted medical opinion of the consulting psychologist; (2) the Commissioner improperly determined her residual functional capacity despite her significant impairments; and (3) the Commissioner violated the duty of full inquiry in failing to order either a psychological or physical consultative examination. *See* Appellant's Initial Br. at 20-41. In response, the SSA argued that the court lacked jurisdiction over her second and third arguments since, although raised in the district court, they had not been "exhausted administratively" because they had not been "explicitly raised administratively." *See* Appellee's Br. at 13. On November 6, 1998, in an unpublished, one paragraph, *per curiam* opinion, the Fifth Circuit considered and rejected Ms. Sims' first argument, but held that it did not have jurisdiction to consider the second and third arguments because they were not raised before the Appeals Council. *See* J.A. at 85-86.

Ms. Sims timely filed a Petition for Rehearing, which was also denied in a *per curiam*, fourteen-word order. *See* J.A. at 87; Appellant's Pet. for Reh'g. at 2-11. With respect to her arguments dismissed on jurisdictional grounds, she made three arguments with various sub-arguments. First, she argued that she sufficiently raised the issue of the improper evaluation of her RFC in letters to both the ALJ and the Appeals Council, and that an expansion of this general argument to the court was permissible.[3] Second, she argued that the SSA

[3] In her Fifth Circuit Reply Brief, Ms. Sims argued that she adequately raised the issue of the residual functional capacity assessment to the Appeals Council and/or to the ALJ by means of two letters written by her attorney to the ALJ and to the Appeals Council. *See* J.A. at 8-24 and 50-70, respectively. *See* Appellant's Reply Br. at 1-7. She explained that the underlying basis of her entire appeal was that the ALJ failed to adequately evaluate the medical evidence, thereby resulting in an incorrect residual functional capacity assessment. Indeed, even the SSA conceded that the argument was "implicitly made" when it argued that she failed to "explicitly raise" it before the Appeals Council. *See* Appellee's Br. at 13.

waived this non-exhaustion argument by not objecting to the U.S. Magistrate Judge's Report and Recommendation which had reviewed the issues on the merits and by failing to cross appeal the district court's order reviewing the issues on the merits. Third, she argued that the application of an "issue exhaustion" requirement was inappropriate in SSA cases in light of (a) the non-jurisdictional nature of this form of exhaustion rule; (b) the SSA's non-adversarial, informal administrative process; (c) the rule's lack of authorization under or consistency with the Social Security Act and SSA regulations; and (d) the SSA's misleading notice by regulations and forms that provide only three lines for a statement of issues and no warnings about the consequences of failing to raise issues before the Appeals Council. *Id.*

Ms. Sims subsequently filed a Petition for a *Writ of Certiorari* with this Court. Her Supplemental Brief in Support of Petition for a *Writ of Certiorari* ("supplemental brief") filed with the Court documented the substantial split among the circuits on the question of whether issue exhaustion is inappropriate as applied to the judicial review of SSA proceedings. On November 29, 1999, this Court granted the Petition for a *Writ of Certiorari* to resolve that issue. *See* 145 L. Ed. 2d 407 (1999).

SUMMARY OF ARGUMENT

As discussed in the supplemental brief filed before this Court, there is a substantial split in the circuits as to whether issue exhaustion should apply to bar Social Security claimants from raising issues in federal court that were not raised administratively. The application of issue exhaustion in the Social Security context is not only unquestionably inappropriate from a jurisdictional perspective as conceded by the SSA, but it is likewise misapplied to SSA proceedings as a *judicially created prudential principle*.

First, the content of the Act, its core relevant legislative purposes, and the text of SSA regulations are inconsistent with judicially created, *ad hoc* issue exhaustion. Unlike its application in the adversarial and more formal contexts from which it arose, the application of issue exhaustion to SSA proceedings flatly contravenes the Act's repeated emphasis on providing claimants with simple, informal, non-adversarial administrative proceedings – objectives which this Court recognized in *Richardson v. Perales*, 402 U.S. 389 (1971). Issue exhaustion undermines the Act's purposes of providing unusually broad judicial review access to protect social insurance rights and to promote uniform adjudication procedures in the administration of a national program. SSA issue exhaustion is inconsistent with the plain language and structural content of numerous provisions of the SSA's regulations and rules, and with more than fifty years of agency practice.

Ms. Sims further submits that this Court should apply a *Darby*-type requirement to SSA proceedings. Because the Court, in *Darby v. Cisneros*, has interpreted the APA – which was modeled on the relevant provisions of the Social Security Act – to preclude the judicial application of non-statutory or non-regulatory exhaustion requirements in APA cases, this Court should apply a similar requirement in SSA cases. *See Darby v. Cisneros*, 509 U.S. 137 (1993). Such a requirement would preclude SSA issue exhaustion since the doctrine is unsupported by statute, regulation, or even by agency practice. *See also Bowen v. Georgetown University Hosp.*, 488 U.S. 204 (1988) (holding that no deference is owed convenient agency litigation positions unsupported by regulations, rulings or agency practice).

Second, even if issue exhaustion were consistent with the SSA's statutory purposes, regulations and administrative scheme, the application of issue exhaustion to SSA proceedings to bar claimants from raising issues in federal court should still be rejected as none of the prudential purposes recognized by this Court is meaningfully furthered. Issue exhaustion does not prevent flouting or disregard of agency

procedures and it undermines decidedly informal, non-adversarial procedures. It does not meaningfully protect agency autonomy by allowing the agency to apply its special expertise and correct its errors. Under the SSA's non-adversarial scheme, the Appeals Council and the ALJs are required to identify, discover, and correct errors *whether or not they are raised by the claimants*. Moreover, because the predominant review function at the Appeals Council is performed by non-lawyers who, like all SSA adjudicative personnel, are prohibited from applying case law, it lacks appropriate authority and expertise to correct many of the errors brought before it.

Similarly, issue exhaustion does not provide for efficient judicial review and does not promote judicial economy. The Appeals Council pursues a general policy of providing boilerplate form-letter denials of requests for review which are non-responsive to any of the issues or arguments raised and which, therefore, provide no guidance to the courts on judicial review. In addition, there is no need to protect the parties from unfair surprise from new issues asserted on judicial review since the opposing party or SSA (as opposed to the decisionmaker) is neither present nor represented in SSA cases until a court action is filed seeking judicial review. In any event, even if meaningful prudential exhaustion purposes could be discerned, a host of applicable exceptions to the application of issue exhaustion in this context dictate the conclusion that issue exhaustion should not be enforced.

Finally, basic principles of equity and due process further direct the conclusion that issue exhaustion should not be applied in the SSA context. The SSA holds out the promise of informality and non-adversarial assistance on administrative review through its regulations, forms and rules that are widely advertised to claimants. However, claimants are then penalized on judicial review when the SSA turns around and seeks dismissal of issues which have not been specifically and formally raised and preserved. For example, the SSA's request for Appeals Council review form, issued widely to claimants, provides only a three-line, two-inch space for the statement of

issues and arguments and contains no issue exhaustion warnings. The SSA's deceptive and misleading conduct violates basic principles of equity and procedural due process, thereby excusing any arguable procedural default.

ARGUMENT

THE FIFTH CIRCUIT ERRED IN IMPOSING AN ISSUE EXHAUSTION REQUIREMENT IN SOCIAL SECURITY CASES TO BAR ISSUES THAT WERE NOT RAISED BY THE CLAIMANT TO THE APPEALS COUNCIL.

A. THE FIFTH CIRCUIT ERRONEOUSLY HELD THAT IT LACKED JURISDICTION OVER ISSUES WHICH WERE NOT RAISED TO THE SSA'S APPEALS COUNCIL.

The Fifth Circuit's holding that it lacked *jurisdiction* to consider issues not raised to the Appeals Council is not supported by the Act, the case law, applicable regulations, or even the decisions of other circuit courts on this issue. While administrative exhaustion requirements can be mandatory or discretionary, unless Congress has "clearly required" the exhaustion requirement in question, *it is discretionary*. *See McCarthy v. Madigan*, 503 U.S. 140, 144 (1992). There is no statement in the Social Security Act which even remotely suggests that the federal courts' jurisdiction only extends to issues, arguments or objections which have been expressly raised in the SSA administrative appeal process. Section 205(g) of the Act, 42 U.S.C. § 405(g), merely requires that the party obtain a "final decision." The SSA's regulations provide that the Appeals Council's denial of a request for review will render the ALJ's decision the SSA's final one. *See* 20 C.F.R. §§ 404.981, 416.1481.

Indeed, there is no requirement in any of the SSA's regulations, rulings or informal rules for issue exhaustion or issue waiver. Just as Congress knows how to make various forms of exhaustion mandatory and jurisdictional, so too, "[t]he Social Security Administration knows how to draft a waiver rule." *Johnson v. Apfel*, 189 F.3d 561, 562 (7th Cir. 1999) (Posner, C.J.). That neither Congress nor the agency has chosen to do so should end this Court's inquiry.

If further support is needed, however, this Court's § 405(g) jurisprudence also forecloses a finding that issue exhaustion is jurisdictional. This Court has explained that the "final decision" requirement embodied in 42 U.S.C. § 405(g):

> [c]onsists of two elements, only one of which is purely "jurisdictional" in the sense that it cannot be waived by the Secretary in a particular case. The waivable element is the requirement that the administrative remedies prescribed by the Secretary be exhausted. The nonwaivable element is the requirement that a claim for benefits shall have been presented to the Secretary.

Bowen v. City of New York, 476 U.S. 467, 483 (1986) (quoting *Matthews v. Eldridge*, 424 U.S. 319, 328 (1976)).

The failure to satisfy a jurisdictional requirement deprives a court of the power or authority to adjudicate the claim. *See id.* at 478-79. In *Bowen v. City of New York*, the claimants satisfied the jurisdictional, nonwaivable presentment requirement simply by filing "applications for benefits [which were] denied by the Secretary." *City of New York v. Heckler*, 742 F.2d 729, 735 (2d Cir. 1984), *aff'd sub nom. Bowen v. City of New York*, 476 U.S. 467 (1986). The vast majority of the SSA's explicit and mandatory statutory or regulatory exhaustion requirements are not truly jurisdictional and may be waived. For example, the explicit requirements that (1) denials of benefits applications be pursued beyond the application denial stage through to an agency reconsideration, an ALJ hearing, and a request for Appeals Council review, and (2) the required compliance with the 60-day limitations periods for each subsequent appellate step in the administrative process, can be waived by the SSA. *See* 20 C.F.R §§ 404.900(a), 416.1400(a); *see Bowen v. City of New York*, 476 U.S. at 478-86. Under this scenario, it follows, *a fortiori*, that the non-statutory, non-regulatory issue exhaustion doctrine cannot possibly be deemed jurisdictional.

Other than the Fifth Circuit, all courts which have discussed the origins of SSA issue exhaustion have found that it "is not jurisdictional however, but prudential." *E.g., Kendrick v. Sullivan*, 784 F. Supp. 94, 99 (S.D.N.Y. 1992); *cf. Pleasant Valley Hosp. v. Shalala*, 32 F.3d 67, 70 (4th Cir. 1994) (holding in a Medicare case that issue exhaustion "is not a strict jurisdictional bar, it is a prudential one"). Accordingly, although the SSA argued before the Fifth Circuit that issue exhaustion was "jurisdictional," *see* Appellee's Br. at 13-15, it is not surprising that it has abandoned that argument in this Court, *see* Opp'n Cert. at 5 n.3 and 7.

B. THE JUDICIAL CREATION OF *AD HOC* ISSUE EXHAUSTION REQUIREMENTS IS INCONSISTENT WITH THE SOCIAL SECURITY ACT, CONGRESSIONAL INTENT, SSA REGULATIONS, AND THE SSA'S INFORMAL, NON-ADVERSARIAL ADMINISTRATIVE PROCESS AND INTRICATE STATUTORY AND REGULATORY SCHEME.

As explained below, the judicial creation of *ad hoc* issue exhaustion requirements is inconsistent with the Act, applicable regulations, legislative intent, and the inherent nature of the nationally administered informal Social Security administrative process. The SSA's attorneys have characterized the Fifth Circuit's holding in *Sims* as the explication of a "prudential" issue exhaustion requirement under which the courts presumptively preclude issues which have not been expressly exhausted in the administrative proceedings subject to narrowly delineated discretionary exceptions. *See* Opp'n Cert. at 7.[4] Even if this Court accepted SSA's attorneys' characterization of the Fifth Circuit's action in Ms. Sims' case, this would

[4] It is not clear whether SSA counsel argues for a prudential doctrine that issues must be presented at some point in the administrative proceedings as a whole in order for the court to address them, or more specifically, at the Appeals Council. *Compare* Opp'n Cert. at 5 ("Sound reasons support the principle that a party must raise an issue in an administrative proceeding in order to preserve the issue on judicial review") *with id.* at 7 ("The prudential requirement that a litigant must have raised a matter before the Appeals Council in order to raise it in court is similar to this court's general practice of not reviewing an issue not raised in or passed upon by the lower court."). The Courts of Appeals which have chosen to continue to apply issue exhaustion have reached different results about whether the requirement applies to the ALJ hearings, to Appeals Council requests for review, or more generally, to the administrative process. *Compare Meanel v. Apfel*, 172 F.3d 1111, 1115 (9th Cir. 1999) ("We have held that appellants must raise issues at their administrative hearings in order to preserve them in this court.") *and Harper v. Secretary of Health and Human Servs.*, 978 F.2d 260, 265 (6th Cir. 1992) (claimant must raise the issue "at the administrative level") *with James v. Chater*, 96 F.3d 1341, 1343-44 (10th Cir. 1996) (claimant must raise the issue before the Appeals Council) *and Paul v. Shalala*, 29 F.3d 208, 210-11 (5th Cir. 1994) (same). The SSA has further complicated this matter by at least temporarily eliminating the Appeals Council step of appeal in some portions of the country, thereby immediately rendering the ALJ decision the SSA's final decision, *see* 20 C.F.R §§ 404.966; 416.1466. The Fifth Circuit's holding in the instant case only addresses whether a claimant must raise an issue to the Appeals Council to preserve the issue for judicial review. However, since the rationales set forth herein would preclude the application of SSA issue exhaustion under any of the above formulations, resolving this matter should be moot.

not cure the Fifth Circuit's erroneous holding. This alternative interpretation of the unarticulated holding in *Sims* is inconsistent with the Act's statutory and regulatory scheme, an informal, non-adversarial legislative mandate, the Act's other core relevant purposes, the SSA's regulations, and over 50 years of agency practice.

" 'Appropriate deference to Congress' power to prescribe the basic procedural scheme under which a claim may be heard in a federal court requires fashioning of exhaustion principles in a manner consistent with Congressional intent and any applicable statutory scheme.' " *Darby v. Cisneros*, 509 U.S. 137, 153 (1993) (quoting *McCarthy*, 503 U.S. at 144). This maxim is particularly instructive in addressing the extent of the courts' authority to craft *ad hoc* restrictions on

judicial review of claims arising from a congressional enactment which "is the most intricate ever drafted by Congress." *Weisbrod v. Sullivan*, 875 F.2d 526, 528 (5th Cir. 1989); *Friedman v. Berger*, 547 F.2d 724, 727 n.7 (2d Cir. 1976), *cert. denied*, 430 U.S. 984 (1977). This most intricate enactment arises from a complex statutory and regulatory scheme for delivering mass justice which governs the administrative hearings, appeals and judicial review processes of "probably 'the largest adjudicative agency in the Western World.' " *Heckler v. Campbell*, 461 U.S. 458, 461 n.2 (1983) (quotation omitted). As specifically discussed herein, not only is there no statutory or regulatory authority for an issue exhaustion requirement, but the statutory provisions, administrative regulations, and legislative history which touch on this issue all support the conclusion that Congress did not intend to leave SSA issue exhaustion requirements to *ad hoc* common law development by the judiciary.

1. Issue exhaustion is inconsistent with the Social Security Act and its core relevant legislative purposes and history.

a. *Congress intended to provide informal, non-adversarial proceedings in Social Security cases.* Congress' repeated emphasis on the importance of an informal, non-adversarial, administrative scheme, is inconsistent with the intent to permit *ad hoc*, judicially created doctrines which introduce procedural formalism and added complexity to the adjudicative process. As this Court powerfully recognized:

> [I]t is apparent that (a) the Congress granted the Secretary the power by regulation to establish hearing procedures; (b) strict rules of evidence, applicable in the courtroom, are not to operate at social security hearings so as to bar the admission of evidence otherwise pertinent; and (c) the conduct of the hearing rests generally in the examiner's discretion. There emerges an emphasis upon the informal rather than the formal. This, we think, is as it should be, for this administrative procedure, and

> these hearings, should be understandable to the layman claimant, should not necessarily be stiff and comfortable only for the trained attorney, and should be liberal and not strict in tone and operation. This is the obvious intent of Congress so long as the procedures are fundamentally fair.

Richardson v. Perales, 402 U.S. at 389. Indeed, in *Perales*, the SSA had specifically argued to the Court that Congress intended to avert a "full blown adversary procedure," to limit adjudication costs, and to "provide a simple procedure whereby claimants can establish their right to benefits." *See* Reply Brief for the Pet'r in *Richardson v. Perales*, at 5-6 n.2 (1970); *see also* H.R. Rep. No. 76-728, at 44 (1939) ("[I]t is not contemplated that the services of an agent or attorney will be necessary in presenting the vast majority of [SSA] claims . . . "); *cf.* H.R. Conf. Rep. No. 96-944 (1980) ("The Conference Committee wishes to make clear that the Secretary's statement of the case be brief, informal, and not technical. The conferees do not contemplate that the statement would resemble the more formal statement of the case approach used by the Veteran's Administration (VA) in its appeals proceedings.").

The SSA issue exhaustion approach urged by the Commissioner before this Court is derived from and similar to that of courts of appeals and "this Court's general practice of not reviewing an issue not raised in or passed upon by lower courts." Opp'n Cert. at 7. However, as the Eighth Circuit recently explained, "[o]bviously, there are reasons why we, an adversarial forum, choose not to review issues that parties do not raise to the district court, another adversarial forum, that have little bearing on whether a federal court should consider an issue not raised before the Social Security Appeals Council." *Harwood v. Apfel*, 186 F.3d 1039, 1043 (8th Cir. 1999). Indeed, the judicial imposition of formal procedural doctrines derived from adversarial contexts would complicate and decrease both the informality and non-adversarial nature of SSA hearings and appeals and directly frustrate Congress' intent.

For example, under long-term agency practice and SSA regulations, "all that is required [to request review from the Appeals Council] is completion of a one-page form (Form HA-520) that provides only a three-line space (roughly two inches in total) for the statement of the issues and grounds, for appeal," *Johnson*, 189 F.3d at 563 (citing 20 C.F.R. § 422.205(a)); *see also Harwood*, 186 F.3d at 1042-43. The judicial imposition of issue exhaustion will require claimants to "bombard the Appeals Council with full briefs in order to preserve the right to judicial review," *Johnson*, 189 F.3d at 563, and carefully and technically ensure that all issues and arguments are plead with specificity.[5] Thus, for the very same reasons this Court held that the Fifth Circuit erred in *Perales* in holding that SSA administrative denials must have a non-hearsay basis in the record – inconsistency with congressional intent to preserve simplicity, informality and fundamental fairness in the SSA's non-adversarial administrative proceedings – this Court should again reject the Fifth Circuit's attempt to add procedural complexity and formality to the SSA adjudicative process. *See also Bowen v. City of New York*, 476 U.S. at 480 (recognizing that 42 U.S.C. § 405(g) is "a statute that Congress designed to be 'unusually protective' of claimants." *Heckler v. Day*, 467 U.S 104, 106 (1983)").

b. *Congress intended to provide broad judicial review access to protect social insurance rights.* The Social Security Act's express concern with providing particularly broad and extensive access to federal court review to protect social insurance rights, is also inconsistent with the judiciary's *ad*

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[5] For a more detailed analysis and discussion of the myriad of ways in which SSA issue exhaustion will complicate and burden the SSA administrative process, see Jon C. Dubin, *Torquemada Meets Kafka: The Misapplication of the Issue Exhaustion Doctrine to Inquisitorial Administrative Proceedings*, 97 Colum. L. Rev. 1289, 1318-21, 1325-1330 (1997).

hoc creation of obstacles to judicial review. As the cornerstone of his "New Deal," President Franklin Delano Roosevelt believed that by including payroll contributions in the Social Security program's methodology, he extended to contributors "a legal, moral and political right to collect their pensions." Arthur M. Schlesinger, Jr., *The Age of Roosevelt: The Coming of the New Deal* 308-09 (1958). As Fordham Professor Matthew Diller has explained: "[t]he insurance analogy serves as a tremendous source of political strength for social insurance programs. Because payment of benefits appears as the return of contributions, any reduction or elimination of benefits can be seen as expropriation." Mathew Diller, *Entitlement and Exclusion: The Role of Disability in the Social Welfare System*, 44 UCLA L. Rev. 361; 383 (1996). Professor Diller further explained:

> Similarly, the erroneous denial of benefits appears as a form of theft. . . . Extensive possibilities for administrative review were intended to assure claimants that denials of benefits would be carefully scrutinized in recognition of the contributions they have made. *Rigorous judicial review of denials of benefits serves the same purpose.* The procedural scheme thus reflects the treatment of social insurance benefits as earned rights upon which beneficiaries are entitled to rely. Accordingly, in responding to charges that the Social Security system is not really an 'insurance' program, Arthur Altmeyer, Chairman of the Social Security Board, responded that '*beneficiaries may and do sue in the Federal courts to enforce their rights. Indeed, that is one of the great virtues of social insurance.*'

Id. at n.66 (Citing Arthur J. Altmeyer, *The Formative Years of Social Security* 222-23 (1966) (other citations omitted and emphasis added)); *see also* H.R. Doc. No. 76-110, at 4 (1939) ("Under federal old-age insurance, benefits are payable as a matter of right"); H.R. Rep. No. 76-728, at 5 (1939) (same).

Consistent with these concerns, Congress enacted a provision in section 205(g) of the Social Security Act, 42 U.S.C.

§ 405(g) (sentence six), which extends unusually broad judicial review rights to claimants through a clause authorizing claimants to submit new and material evidence outside of the administrative records on judicial review and empowering the courts to remand cases back to the agency for the evaluation of new evidence under certain circumstances. In evaluating this provision of the Act, this Court has observed:

> As provisions for judicial review of agency action go, § 405(g) is somewhat unusual. The detailed provisions for the transfer of proceedings from the courts to the Secretary and for the filing of the Secretary's subsequent findings with the court suggest a degree of direct interaction between a federal court and an administrative agency alien to traditional review of agency action under the Administrative Procedure Act. As one source puts it:
>
> > The remand power places the courts, not in their accustomed role as external overseers of the administrative process, making sure that it stays within legal bounds, but virtually as coparticipants in the process, exercising ground-level discretion of the same order as that exercised by ALJs and the Appeals Council when they act upon a request to reopen a decision on the basis of new and material evidence.

Sullivan v. Hudson, 490 U.S. 877, 885 (1989) (citations omitted). It would defy logic for Congress, on the one hand, to extend to courts an unusual additional judicial review responsibility to ensure claimants' social insurance rights are protected by requiring that they evaluate, for remand purposes, new evidence which had not been raised in the administrative proceedings, while, on the other hand, silently authorizing the courts to undermine claimants' pursuit of benefits on judicial review by refusing to consider legal issues which were not raised below.

As a more general matter, § 405(g) establishes the contours and limits on judicial review in SSA cases and does not withdraw the court's judicial review responsibilities over

issues which have not been raised before the agency. Section 405(g) merely requires that the claimant exhaust the administrative process by receiving a final decision from the Commissioner after a hearing in order to secure a right to judicial review. By enacting this section, "Congress has elevated the ordinary administrative 'common law' principle of exhaustion into a statutory requirement." *Doyle v. Secretary of Health and Human Servs.*, 848 F.2d 296, 299 (1st Cir. 1988). Through an express delegation of authority from Congress, *see* 42 U.S.C. § 405(a), the SSA has defined the specific steps which claimants must exhaust to receive a final decision and pursue judicial review under § 405(g), and none of those steps requires issue exhaustion, *see* 20 C.F.R. §§ 404.900, 416.1400.

Obviously, both Congress and the SSA devoted great attention to the codification of appropriate exhaustion requirements. That neither body deemed it necessary or appropriate to add an issue exhaustion prerequisite to judicial review provides further support for the conclusion that the *ad hoc* judicial creation of such a rule was not intended. The task of defining the jurisdiction of federal courts is entrusted to the Congress by the Constitution. *See Palmore v. United States*, 411 U.S. 389, 400-01 (1973). As this Court has recognized, the federal courts' " 'virtual unflagging obligation' to exercise the jurisdiction given them [means] . . . '[they] have no more right to decline the exercise of jurisdiction given than to usurp that which is not given.' " *McCarthy*, 503 U.S. at 146 (quoting *Cohens v. Virginia*, 6 Wheat. 264, 404, 5 L. Ed. 257 (1821)).

c. *Congress intended to provide uniform procedures in the administration of a national benefits program.* As this Court has recognized:

> wide variations of judicially imposed [procedures] also would prevent realization of the Congress' oft repeated goal of uniform administration of the Act, *see, e.g.*, S. Rep. No. 96-408, at 52-56 (1979) ('emphasizing concern over state-to-state variations and expressing hope that current legislation would

> both improve the quality of determinations and ensure claimants throughout the Nation will be judged under the same uniform standards *and procedures*').

Heckler v. Day, 467 U.S. 104, 116 (1983) (emphasis in original); *see also* 63 Fed. Reg. 24,927, 24,930 (1998) (recognizing the importance to SSA of "uniform and consistent adjudication procedures necessary for the administration of a national program").

At present, the Courts of Appeals are hopelessly divided on the contours of this judicially created, *ad hoc*, issue exhaustion rule. They are divided on such questions of: (1) whether issue exhaustion has any place in SSA cases;[6] (2) whether it is a jurisdictional or a prudential doctrine;[7] (3) whether it applies to the failure to raise issues at the Appeals Council level, the hearing level, or to the administrative proceedings as a whole;[8] (4) the degree of specificity or precision required to be deemed to have raised an issue below;[9] and (5) whether SSA's counsel's failure to raise issue exhaustion in a timely fashion precludes the application of

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[6] *Compare Johnson v. Apfel*, 189 F.3d 561, 562-64 (7th Cir. 1999) (Posner, C.J.) (categorically rejecting SSA issue exhaustion, reversing six prior Seventh Circuit decisions which had applied SSA issue exhaustion, and inviting *en banc* rehearing which was declined by all Seventh Circuit judges in regular active service) *and Harwood v. Apfel*, 186 F.3d 1039, 1042-43 (8th Cir. 1999) (categorically rejecting SSA issue exhaustion) *with Paul v. Shalala*, 29 F.3d 208, 210 (5th Cir. 1994) (SSA issue exhaustion is jurisdictional).

[7] *See* cases cited at Section A above, pages 8-10, *supra*.

[8] *See* cases cited at n.4 above.

[9] *Compare Johnson*, 189 F.3d at 562-63 (noting that under the pre-*Johnson* Seventh Circuit SSA issue exhaustion cases, the court required that the issue "must be developed") *with McQueen v. Apfel*, 168 F.3d 152, 155 (5th Cir. 1999) (court may consider a new issue if it is an "expansion of the rationale proffered in support of the appeal to the Appeals Council").

issue exhaustion.[10] Indeed, there also appears to be divisions of opinions among different panels within the same circuit[11] and among different members of the same panel.[12] It is possible that a different Fifth Circuit panel could have found: (1) that either Ms. Sims' letter to the ALJ, or letter to the Appeals Council, or both together, satisfied the issue exhaustion requirement by placing the agency on basic notice of the residual functional capacity issue which was further developed and expanded on judicial review; or (2) that SSA counsel waived the issue exhaustion argument by not raising it in a timely fashion.[13]

Moreover, it is unclear whether SSA *ad hoc* issue exhaustion should apply only in cases where claimants were represented by attorneys,[14] or whether it should also apply in cases

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[10] *Compare Nolen v. Sullivan*, 939 F.2d 516, 519 (7th Cir. 1991) (SSA waives issue exhaustion argument by failing to raise it in a timely fashion on judicial review) *with Sims* (Fifth Circuit rejects, without reasoning, argument that SSA counsel's failure to raise issue exhaustion in the district court or by cross-appeal to the Court of Appeals precludes issue exhaustion argument in the Court of Appeals).

[11] *Compare McQueen with Sims* (on issue specificity *see* note 33 at page 45, *infra*).

[12] *Compare Wienke v. Chater*, No. 95-16406, 110 F.3d 72, 1997 U.S. App. Lexis 5530 at *4-5 (9th Cir. May 21, 1997) (Judges Hall and Johnson find raising due process issue for the first time on motion to reopen to the Appeals Council is insufficient to prevent waiver on judicial review) *with id.* at *10-12 (Judge Reinhardt dissents on ground that the issue was clearly presented on the record and the SSA appeal form (HA-520) is inadequate).

[13] *See* note 3 and accompanying text at pages 4-5, *supra*; *see also Jones v. Apfel*, No. 99-7039, 2000 WL 3875 (10th Cir. Jan. 4, 2000) (holding that the SSA's failure to cross-appeal the district court's decision considering the issues on the merits precluded the Tenth Circuit's consideration of the SSA's assertion of issue exhaustion on appeal to the Tenth Circuit).

[14] *See Meanel v. Apfel*, 172 F.3d 1111, 1115 (9th Cir. 1999) (claim of issue exhaustion's unfairness would be "more persuasive if [claimant] had not been represented by counsel").

where claimants are represented by paralegals, lay representatives, social workers, friends, relatives and other non-attorneys as suggested by SSA Counsel,[15] or whether it should apply, in addition, to cases where claimants have no representation, as in the Tenth Circuit.[16] Under a judicially created *ad hoc* issue exhaustion scheme, claimants' § 405(g) judicial review rights have significantly different restrictions in different parts of the country (and perhaps even different restrictions in the same parts of the country at different times). Thus, it is unquestionably inconsistent with the Act's "express Congressional goal of uniformity," *Heckler v. Day*, 467 U.S. at 116 n.27, and should be rejected on that basis as well.

2. Issue exhaustion is inconsistent with SSA regulations and rules.

Apart from the issue exhaustion doctrine's inconsistency with the Act and its core relevant legislative intent and history, as Chief Judge Posner found, judicially created issue exhaustion in SSA cases "*cannot be squared with the regulations governing appeals to the Appeals Council.*" *Johnson*, 189 F.3d at 563 (emphasis added). He further elaborated:

> The regulations permit but do not require the filing of a brief with the Appeals Council. 20 C.F.R. § 404.975. All that is required is completion of a one-page form (Form HA-520) that provides only a space of three lines (roughly two inches in total) for the statement of the issues and grounds for appeal.

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[15] *See* Opp'n Cert. at 11-12; *compare Sears v. Bowen*, 840 F.2d 394, 402 (7th Cir. 1987) (non-attorney representative held to a lesser standard than attorney) *with Hudson v. Heckler*, 755 F.2d 781, 784-85 (11th Cir. 1985) (non-attorney representative held to essentially the same standard as attorney).

[16] *See James v. Chater*, 96 F.3d 1341, 1343-44 (10th Cir. 1996) (announcing that it will apply issue exhaustion prospectively to completely unrepresented claimants who have received "direct admonition" of the requirement from the agency).

20 C.F.R. § 422.205(a). (Johnson's lawyer appended his one-page letter to the form rather than attempting to squeeze his argument into the tiny space.) The Appeals Council's review is, moreover, plenary unless the Council states otherwise. § 404.976(a). Basically all that seems contemplated or required is that the disappointed claimant ask the Appeals Council to take a look at what the administrative law judge has done and reverse if it finds an error. The Appeals Council operates more like a complaint bureau than an appellate court; the Social Security Administration estimates that it should take only 10 minutes to fill out the form. 58 Fed. Reg. 28,596 (1993). We do not know what the Appeals Council does in cases in which the appellant leaves the space in his Form HA-520 completely blank, and therefore need not decide whether that would be a case of waiver. The only reference in the regulations to anything that looks like waiver is a warning that if the applicant fails to 'take the next step [in the review process] within the stated time period, you will lose your right to further administrative review and your right to judicial review' (unless you show cause for the failure). 20 C.F.R. § 404.900(b). Johnson took the required next step after being turned down by the administrative law judge by filing his Form HA-520 on time with the Appeals Council. The Social Security Administration knows how to draft a waiver rule. If courts take it upon themselves to adopt waiver rules for the agency that compel disappointed applicants for disability benefits to bombard the Appeals Council with full briefs in order to preserve their right to judicial review, we shall be disserving the agency.

Id. Focusing on other aspects of the SSA's regulations, the Eighth Circuit reached a similar conclusion. It stated:

> [T]he Commissioner urges us to adopt a waiver rule that the agency does not itself enforce. The Appeals

> Council routinely considers arguments not specifically raised by claimants before it – a product of its duty to review an ALJ's decision 'in an informal nonadversary (sic) manner' and a fitting analogue to the ALJ's well-established duty to develop a full and fair record (even where, as here, claimants are represented by counsel). *See* 20 C.F.R. §§ 404.900(b), 416.1400(b) (1999); Jon C. Dubin, *Torquemada Meets Kafka: The Misapplication of the Issue Exhaustion Doctrine to Inquisitorial Administrative Proceedings*, 97 Colum. L. Rev. 1289, 1325-26 and n.179 (1997); *Wilcutts v. Apfel*, 143 F.3d 1134, 1137-38 (8th Cir. 1998) (stating that Commissioner has duty to develop record because hearing is non-adversarial; 'the goals of the Secretary and the advocates should be the same: that deserving claimants who apply for benefits receive justice').

Harwood, 186 F.3d at 1042.

While the Seventh and Eighth Circuits are the only Courts of Appeals to reject SSA issue exhaustion, they are also the only ones to provide more than perfunctory examination of any of the agency's relevant regulations or its statutory and regulatory scheme. *Cf. Meanel v. Apfel*, 172 F.3d 1111, 1115 (9th Cir. 1999) (applying issue exhaustion without considering statutory or regulatory scheme); *James v. Chater*, 96 F.3d 1341, 3143 (10th Cir. 1996) (same); *Paul v. Shalala*, 29 F.3d 208, 210 (5th Cir. 1994) (same). Very recently in an unpublished decision, the Tenth Circuit recognized that its decision in *James* was "on questionable footing" in light of *Johnson* and *Harwood*. *Jones v. Apfel*, No. 99-7039, 2000 WL 3875 (10th Cir. Jan. 4, 2000). Even prior to the *Jones* case, however, a district court in the Tenth Circuit had already refused to apply the SSA issue exhaustion rule established in *James v. Chater* in light of the reasoning of *Johnson* and

Harwood. *See Wilson v. Apfel*, No. Civ.A. 98-2529-JWL, 1999 WL 966296 (D. Kan. Oct. 19, 1999).[17]

The Seventh and Eighth Circuits' decision to reject issue exhaustion in the SSA context is bolstered by review of additional SSA regulations and rules. For example, 20 C.F.R. §§ 404.940, 416.1440 provides that bias objections to the ALJ assigned to conduct the hearing "must" be made to that ALJ at the "earliest possible time." The very fact that the regulations mandate that a particular issue – bias – must be raised administratively, supports the conclusion that the SSA did not contemplate that prudential exhaustion principles mandated the general administrative assertion of issues to preserve those specific issues for later review.

Moreover, the agency's internal rules provide that a claimant may initiate the Appeals Council review process simply by "impl[ying] that he or she is requesting review." *See* HALLEX I-3-060, Filing a Request for Review, 1993 WL 643084 (SSA), at *1. "Implied request for review occurs when the claimant expresses disagreement or dissatisfaction with the ALJ's action or an intent to pursue appeal rights." *Id.* Obviously, such an implied request for review does not contemplate the presentation of all of a claimant's fully developed issues and arguments.

Finally, 20 C.F.R. §§ 404.966 and 416.1466 provides for testing of the Appeals Council's elimination in several jurisdictions, thereby immediately rendering the ALJ hearing decision as the agency's final decision for judicial review purposes. This test is the result of a series of studies and proposals from the mid-1980s to the present, documenting the Appeals Council's inability to perform sufficiently meaningful functions under its present circumstances and exploring

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[17] In *Wilson*, the court reasoned that "because the foundations of the doctrine have been called into question and it is possible that the Tenth Circuit might, like its sibling circuits the Seventh and Eighth, change its view, the court believes that prudence dictates that the matter be reviewed on the merits." 1999 WL 966296 at *7.

either eliminating the Appeals Council or significantly refocusing its responsibilities.[18] It is manifestly inconsistent to impose an exhaustion requirement which will result in a change in practice to require fully researched briefs, and more aggressive advocacy to an appeals body which the agency has been considering abolishing since the 1980s and which has been partially eliminated by formal regulation already.

3. Issue exhaustion is inconsistent with more than fifty years of agency practice.

The SSA's long-term administrative practice further directs the conclusion that issue exhaustion is inconsistent with the SSA's unique statutory and regulatory scheme. Although this Court enunciated the issue exhaustion doctrine many decades earlier,[19] the courts did not begin to apply the doctrine to SSA cases with any frequency (and SSA counsel did not apparently invoke the doctrine with regularity) until the early to mid-1990s. *See* Note 24, *infra* at 31-32 (tracing origins of each circuit's rule). Even in the late 1980s – more than half a century after the Act's enactment – the SSA's issue exhaustion assertion was considered a "*novel argument.*" *See Fandino v. Secretary of Health and Human Servs.*, No. 86 Civ. 0010 (RLC), 1987 WL 16150, at *5 n.4 (S.D.N.Y. Aug. 21, 1987) (emphasis added); *see also Jozefick v. Shalala*, 854 F. Supp. 342, 346 n.9 (M.D. Pa. 1994) (rejecting application of issue exhaustion and noting in 1994 that the SSA had not provided any authority supporting such a rule). In light of the high volume of SSA cases through much of this time period,[20] and the corresponding temptation for the SSA to seek expedient ways to dispose of cases on judicial review without

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[18] *See* Dubin, *supra*, at 1325-30 (citing studies and reports).

[19] *See, e.g., United States v. L.A. Tucker Truck Lines Inc.*, 344 U.S. 33, 36-37 (1952); *Unemployment Compensation Comm'n v. Aragon*, 329 U.S. 143, 154-56 (1946).

[20] *See, e.g., Labonne v. Heckler*, 574 F. Supp. 1016, 1018 (D. Minn. 1983) ("[M]ore than one new [SSA] appeal is being filed here every day.").

reaching the merits, the virtual absence of reference to issue exhaustion in SSA case law until the 1990s strongly indicates that the SSA may have agreed, for the majority of the SSA's life span, that the Act and the regulations are structurally inconsistent with common law issue exhaustion.[21]

4. The Court's opinions in *Darby v. Cisneros* and *Bowen v. Georgetown Univ. Hosp.*, support the conclusion that SSA issue exhaustion should be left to the political branches of government and not to *ad hoc* development by the courts.

Even though the Social Security Act's structure and legislative history reveals even greater solicitude to the importance of judicial review access than is the case with agencies governed solely by the Administrative Procedure Act (APA) on judicial review, *see Sullivan v. Hudson*, 490 U.S. at 885, a requirement that the SSA promulgate an issue exhaustion rule (or seek one from Congress) would simply place SSA exhaustion jurisprudence on par with that of APA agencies under this Court's decision in *Darby*. *See Darby v. Cisneros*, 509 U.S. 137 (1993). In *Darby*, this Court held that federal courts do not have the authority to require a plaintiff to exhaust available administrative remedies before seeking judicial review under the APA where neither the statute nor relevant agency rules specifically mandate exhaustion as a prerequisite to judicial review. *See id.* As this Court has held in a different context that it need not determine whether SSA claimants are entitled to the protections of the APA because the APA was "modeled upon the Social Security Act," such a *Darby*-type

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[21] The SSA has provided no reasons or justification for this apparently relatively recent departure from long-term agency practice. *See generally Motor Vehicle Mfrs. Ass'n v. State Farm Ins. Co.*, 463 U.S. 29, 57 (1983) ("[A]n agency's view of what is in the public interest may change, either with or without a change in circumstances. But an agency changing its course *must supply a reasoned analysis.*") (emphasis added).

requirement for SSA exhaustion should be inferred. *See Perales*, 402 U.S. at 409; *Ginsburg v. Richardson*, 436 F.2d 1146, 1148 n.1 (3d Cir. 1971) (collecting cases "holding that the Administrative Procedure Act must be read *in para materia* with the appropriate section of the Social Security Act on the subject of judicial review"), *cert. denied*, 402 U.S. 976 (1971).

The political branches of government are best suited to determine if an SSA issue exhaustion rule can be implemented which will be consistent with the SSA's intricate and complex scheme, the Act's core relevant legislative purposes, and with both present fiscal and operational realities and projected inevitable transformations of the Social Security adjudicative process and overall pension system. For that reason, a constitutionally enacted congressional issue exhaustion provision would be dispositive and a duly promulgated issue exhaustion regulation would be entitled to substantial deference under this Court's decision in *Chevron U.S.A. Inc. v. Natural Resource Defense Council, Inc.*, 467 U.S. 837, 842-45 (1984).

The courts "accord deference to agencies under *Chevron* . . . because of a presumption that Congress, when it left ambiguity in a statute meant for implementation by an agency, understood that the ambiguity would be resolved, first and foremost, by the agency, and desired the agency (*rather than the courts*) to possess whatever degree of discretion the ambiguity allows." *Smiley v. Citibank (South Dakota), N.A.*, 517 U.S. 735, 740-41 (1996) (emphasis added). However, as this Court has explained:

> We have never applied the principle of [*Chevron* and its progeny] to agency litigating positions that are wholly unsupported by regulations, rulings, or administrative practice. To the contrary, we have declined to give deference to an agency counsel's interpretation of a statute where the agency itself has articulated no position on the question, on the ground that 'Congress has delegated to the administrative official and not to appellate counsel the

> responsibility for elaborating and enforcing statutory commands.'

Bowen v. Georgetown Univ. Hosp., 488 U.S. 204, 212 (1988) (citations omitted); *see also Smiley*, 517 U.S. at 741. Moreover, "[t]he deliberateness of such positions, if not indeed their authoritativeness, is suspect." *Smiley*, 517 U.S. at 741. Because in the instant case, as in *Georgetown Univ. Hosp.*, "deference to what appears to be nothing more than an agency's convenient litigating position would be entirely inappropriate," 488 U.S. at 213,[22] this Court should reverse the Fifth Circuit's decision and require the agency, if it so chooses, to explore issue exhaustion "pursuant to the notice-and-comment procedures of the Administrative Procedure Act designed to assure due deliberation." *Smiley*, 517 U.S. at 741.[23]

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[22] Because SSA counsel has indicated that it "has the [issue exhaustion] matter under review" and that it can "conclusively resolve [it] by regulation," *see* Opp'n Cert. at 13, the agency can claim no prejudice from a holding that the courts are not free to mandate issue exhaustion until the doctrine is effectuated through duly promulgated regulations.

[23] Although the APA exempts from public rulemaking requirements, matters related to grants and benefits, the SSA has agreed to be bound by APA rulemaking including the requirements of notice and public participation. *See* 36 Fed. Reg. 2,532 (1971) (publicizing SSA announcement to follow APA notwithstanding benefit exception in 5 U.S.C. § 553(a)); 47 Fed. Reg. 26,886 (1982) (extending announcement to follow APA). Upon agreeing to be bound by the APA, an agency may not disregard its provisions on a case-by-case basis. *See Rodway v. United States Dept. of Agric.*, 514 F.2d 809, 814 (D.C. Cir. 1975).

C. THE APPLICATION OF A PRUDENTIAL ISSUE EXHAUSTION RULE TO THE SSA'S UNIQUELY INFORMAL, NON-ADVERSARIAL ADMINISTRATIVE APPEALS PROCESS IS IMPROPER SINCE IT LACKS MEANINGFUL PRUDENTIAL JUSTIFICATION IN THIS COURT'S ADMINISTRATIVE COMMON LAW EXHAUSTION JURISPRUDENCE.

Even if judicially created issue exhaustion were not deemed inconsistent with the SSA's statutory and regulatory scheme, it still should be categorically rejected in SSA cases since none of the purposes recognized as a prerequisite to the application of a prudential exhaustion requirement is meaningfully furthered in this context. As a general matter, the administrative, common law principle that parties must usually exhaust prescribed administrative remedies before seeking relief from federal courts, was created by courts to promote the twin, general goals of protecting administrative agency authority and promoting judicial efficiency. *See McCarthy*, 503 U.S. at 145. Courts have identified four specific applications in support of administrative exhaustion: (1) implementing congressional intent to delegate authority to the agency by discouraging frequent and deliberate flouting of administrative procedures; (2) further protecting agency autonomy by allowing the agency in the first instance to apply its special expertise and correct its errors; (3) providing more efficient judicial review by permitting the parties to develop the facts of the case in the agency proceedings; and (4) promoting judicial economy by avoiding needless repetition of administrative and judicial fact-finding and perhaps mooting the judicial controversy. *See id.* at 145-46; Bernard Schwartz, *Administrative Law* § 833 (3d ed. 1991) (citing cases).

The doctrine that *issues* not properly raised or preserved in administrative proceedings cannot be asserted on judicial review, while more often explicitly derived by statute, has also been applied as a form of judicially created prudential exhaustion. *See Marine Mammal Conservancy v. Department*

of Agric., 134 F.3d 409, 412 (D.C. Cir. 1998). Similar to other forms of exhaustion, issue exhaustion also serves the general goals of agency autonomy and judicial efficiency and the four specific applications of those goals and purposes discussed above. *See Massachusetts Dept. of Pub. Welfare v. Secretary of Agric.*, 984 F.2d 514, 523-24 (1st Cir. 1993) (describing purposes underlying the "raise or waive rule in the administrative law context").

Because issue exhaustion, like other forms of common law exhaustion, is a flexible, prudential doctrine, the courts have identified prudential exceptions. Courts have declined to apply this doctrine in situations where: (1) assertion of the unpresented claim or issue would have been futile, *see Bethesda Hosp. Ass'n v. Bowen*, 485 U.S. 399, 406-07 (1988); (2) the issues involved were strictly legal and did not call for unique agency expertise, *see, e.g., Atlantic Richfield v. Department of Energy*, 769 F.2d 771, 782 (D.C. Cir. 1984) (" 'No factual development or application of agency expertise will aid the court's decision.' Additionally, because we are 'relatively more expert' to ascertain the meaning of statutory terms, we would not displace agency skill or invade the field of agency discretion.") (quotation omitted); (3) the issue not raised by the appellant was raised by another party to the proceeding, *see NRDC v. EPA*, 824 F.2d 1146, 1151 (D.C. Cir. 1987); (4) "exceptional circumstances" are present, *see Duncanson-Harrelson Co. v. Director, Office of Worker's Compensation Programs*, 644 F.2d 827, 832 (9th Cir. 1981); or (5) "manifest injustice" would result from the court's refusal to entertain the new issue on judicial review, *see Board of Instruction v. Finch*, 414 F.2d 1068, 1072-73 (5th Cir. 1969).

Unlike other forms of exhaustion, issue exhaustion is derived from a well-established prudential principle of formal appellate judicial procedure. Motivated by similar concerns over judicial economy and the autonomy of inferior tribunals, the Supreme Court ordinarily "does not decide questions not raised or resolved in the lower court." *Taylor v. Freeman & Krontz*, 503 U.S. 638, 645-46 (1992). The courts of appeals

have followed the Supreme Court's lead and have held that appellate courts should not ordinarily consider issues and arguments that have not been properly raised or preserved in the trial courts. *See, e.g., Crow v. Shalala*, 40 F.3d 323, 324 (10th Cir. 1994); *In re Corrugated Container Antitrust Litig.*, 647 F.2d 460, 461 (5th Cir. 1981). The issue exhaustion doctrine reflects the appropriation to administrative law of this settled principle of formal judicial appellate procedure. *See Massachusetts Pub. Welfare*, 984 F.2d at 523-24 ("raise or waive rule in the administrative law context" is "analogous to the established rule that appellate courts will not entertain arguments which could have been, but were not raised in the trial court"); *see also United States v. Menendez*, 48 F.3d 1404, 1413 (5th Cir. 1995) ("[T]he doctrine of waiver in administrative law parallels the well-established rule that appellate courts will not consider issues not raised before the trial court.").

However, Justice Frankfurter has expressly counseled against the careless application of appellate judicial procedure to judicial review of *agency action*. *FCC v. Pottsville Broad. Co.*, 309 U.S. 134, 144 (1940) ("To assimilate the relation of these administrative bodies and the courts to the relationship between lower and upper courts is to disregard the origin and purposes of the movement for administrative regulation and at the same time to disregard the traditional scope, however far reaching, of the judicial process."). In rejecting the application of issue exhaustion to SSA cases, the Eighth Circuit properly noted that the adversarial nature of court proceedings and the non-adversarial nature of SSA proceedings is a critical distinction for the application of this prudential doctrine. *See Harwood*, 186 F.3d at 1043.

This Court has also specifically directed that in applying common law exhaustion principles, "[a]pplication of the doctrine to specific cases *requires an understanding of its purposes and of the particular administrative scheme involved*." *McKart v. United States*, 395 U.S. 185, 193 (1969) (emphasis added). The court's attention must be "directed to both the

nature of the claim presented and *the characteristics of the particular administrative procedure provided*." *McCarthy*, 503 U.S. at 146 (emphasis added).

In their decisions to superimpose a formal principle of appellate judicial procedure on agency adjudication through the issue exhaustion doctrine, the Fifth Circuit and the other Circuits which have approved SSA issue exhaustion have failed to provide any meaningful consideration of the relevance of the SSA's unique statutory and regulatory scheme, administrative model, or operational reality. Indeed, a review of the origins of each Circuit's SSA issue exhaustion rule reveals that each court has heedlessly appropriated the rule from an adversarial context without any analysis of the propriety of applying the doctrine in the SSA's informal, non-adversarial setting.[24] If issue exhaustion is a discretionary,

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[24] The Fifth Circuit's issue exhaustion rule in *Paul v. Shalala*, applied to Ms. Sims, was directly derived in part from the unexplained application of the formal appellate procedural issue preservation rule announced in *In re Corrugated Container*. *See Paul*, 29 F.3d at 210-211 (citing *In re Corrugated Container Antitrust Litig.*, 647 F.2d 461 (5th Cir. 1981)). The Sixth Circuit's rule in *Harper v. Secretary of Health and Human Servs.*, 978 F.2d 260, 265 (6th Cir. 1992) and the Eighth Circuit's pre-*Harwood* rule, announced in *Weikert v. Sullivan*, 977 F.2d 1249, 1254 (8th Cir. 1992), each relied, without explanation, on a Sixth Circuit Black Lung worker's compensation decision, *Hix v. Director, Office of Workers' Compensation Programs*, 824 F.2d 526, 527 (6th Cir. 1987). The *Hix* case, in turn, relied on *Cox v. Benefits Review Board*, 791 F.2d 445, 446 (6th Cir. 1986) which clarified that these adversarial worker's compensation hearings are governed by a duly promulgated issue exhaustion requirement that "a petition for review shall contain a statement indicating the specific contentions of the petitioner and describing with particularity the substantial questions of law or fact to be raised on appeal 20 C.F.R. § 802.210(a) (1985)." *Id.* In *Johnson*, Chief Judge Posner noted that the Seventh Circuit's SSA issue exhaustion cases arose from the application of a decision from "an unrelated area of administrative regulation." 189 F.3d at 563 (citing *Weyerhauser Co. v. Marshall*, 592 F.2d 373, 376 (7th Cir. 1979) (applying exhaustion analysis to excuse complete bypass of adversarial OSHA hearing to test validity of OSHA inspection warrant in

prudential doctrine, these courts have abused their discretion by not even considering a critical factor which this Court has made mandatory in exhaustion analysis under *McKart* and *McCarthy* – the purposes, nature and character of the agency's administrative scheme. *Cf. Stevens v. Northwest Ind. Dist. Council*, 20 F.3d 720, 733 n.29 (7th Cir. 1994) (failure to consider the relevant factors enumerated by the Court in *Clayton v. UAW*, 451 U.S. 679, 688-89 (1981), or proffered grounds which could legitimately excuse failure to exhaust remedies under the Labor and Management Reporting Disclosure Act, would be an abuse of discretion).

Undertaking the analysis mandated by *McKart* and *McCarthy* reveals that the purposes underlying administrative exhaustion generally, and adversarial agency issue exhaustion more specifically, are not similarly well-served – and in some cases are substantially undermined – in the SSA setting. Further, even if recognized exhaustion purposes were deemed to be furthered in SSA cases, some or all of the recognized exceptions to exhaustion apply in this context.

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federal court)); *see also Pappendick v. Sullivan*, 969 F.2d 298, 302 (7th Cir. 1989) (applying *Weyerhauser* issue exhaustion *dicta* to Medicare case without reasoning), *cert. denied*, 506 U.S. 1050 (1993); *Pope v. Shalala*, 998 F.2d 473, 480 n.6 (7th Cir. 1993) (applying *Pappendick* issue exhaustion rule to SSA proceedings without explanation). The Ninth Circuit's rule in *Meanel v. Apfel*, 172 F.3d 1111, 1115 (9th Cir. 1999) was derived, without reasoning, from *Avol v. Secretary of Health and Human Servs.*, 883 F.2d 659, 660 (9th Cir. 1989), a Medicare decision. *Avol* was derived, without explanation, from a decision in an adversarial immigration proceeding. *See id.* (citing *Israel v. INS*, 710 F.2d 601, 605 (9th Cir. 1983), *cert. denied*, 465 U.S. 1068 (1984). Finally, the Tenth Circuit's rule in *James v. Chater*, 96 F.3d 1341, 1343-44 (10th Cir. 1996) relied on *Pope*, *Harper*, *Weikert* and other unpublished or inapposite cases, without any reasoning beyond the recognition that some courts had applied the general issue exhaustion rule to SSA proceedings.

1. SSA issue exhaustion does not implement congressional intent to delegate authority to the agency or to discourage frequent and deliberate flouting of administrative procedures.

The absence of an issue exhaustion rule would not encourage a deliberate flouting of the SSA hearing and administrative appeals process. By statute and regulation, all claimants would still be required to resort to those decidedly informal processes before securing judicial review of a decision denying benefits. Indeed, there would be absolutely no decrease in the invocation of these processes in the manner specified in the Social Security Act and in the SSA's numerous relevant regulations. Although the absence of issue exhaustion might arguably reduce the degree to which legal issues and arguments would be asserted in SSA hearings and administrative appeals, this Court recognized in *Perales* that Congress did not intend to promote comprehensive evaluation of legal issues and arguments through the informal, non-adversarial SSA adjudicative process. *See* Section B above, pages 10-27, *supra*.

In addition, congressional intent to promote broad judicial review rights, uniformity, and consistency of adjudication in a national program would also be undermined through this requirement. Moreover, the agency's exercise of delegated authority, as evidenced by its regulations and rules governing adjudication and exhaustion, are inconsistent with an issue exhaustion requirement and would be furthered rather than flouted by a decision invalidating *ad hoc* SSA issue exhaustion. *Id.*

2. SSA issue exhaustion does not meaningfully protect agency autonomy by allowing the agency to apply its special expertise and correct its errors.

The application of issue exhaustion in the SSA context will not further the goal of meaningfully protecting agency autonomy by allowing the Agency to apply its expertise and

correct its errors. The substantial distinctions between the informal non-adversarial SSA hearing adjudication model and the traditional adversary model employed by courts and regulatory administrative agencies, compel different expectations regarding the presentation of issues or claims at the hearing and the manner in which the agency marshals its "special expertise." In the non-adversarial or "inquisitorial" SSA administrative model, the ALJ is charged with the duty of protecting the claimant's rights, developing the facts on the claimant's behalf, and identifying the issues, whether or not the claimant is represented. *See Harwood*, 186 F.3d at 1042-43. Thus, the responsibility to have raised, developed or identified a particular issue at the hearing is at least shared by the "expert" ALJ.

Even more so than the SSA hearing process, the SSA's Appeals Council's structure and operating reality provide strong prudential justifications against the creation of an issue exhaustion requirement. "The Appeals Council routinely considers arguments not specifically raised by the claimants before it – a product of its duty to review an ALJ's decision in an 'informal non-adversary (sic) manner' and a fitting analogue to the ALJ's well-established duty to develop a full and fair record (even when, as here, claimants are represented by counsel)." *Harwood*, 186 F.3d at 1042 (quoting 20 C.F.R. §§ 404.900(b), 416.1400(b) other citations omitted); *see also Weinke v. Chater*, No. 95-16406, 110 F.3d 72, 1997 U.S. App. LEXIS 5530 at *11-12 (9th Cir. Mar. 21, 1997) (Reinhardt, J., dissenting). Indeed, as Chief Judge Posner observed, SSA regulations (20 C.F.R. §§ 404.976(a), 416.1476(a)) only permit the Appeals Council to limit the issues it considers in its usual review process if it specifically notifies the claimant in writing. *See Johnson*, 189 F.3d at 563 (review is "plenary unless the council states otherwise," citing § 404.976(a)). Accordingly, the "expert" Appeals Council also shares responsibility for the failure to have considered issues that arise from the record before it.

Moreover, in view of the Appeals Council's present operational reality as documented in two public record reports – the 1987 report of the Administrative Conference of the United States ("ACUS") and a comprehensive study of the Appeals Council's operations commissioned for the ACUS and conducted by Professors Charles H. Koch, Jr. and David A. Koplow – the Appeals Council wields very little expertise and corrects relatively few errors. *See* Administrative Conference of the United States, *A New Role for the Social Security Appeals Council*, 52 Fed. Reg. 49,141, 49,143 (1987); Charles H. Koch, Jr. & David A. Koplow, *The Fourth Bite at the Apple: A Study of the Operation and Utility of the Social Security Administration's Appeals Council*, 17 Fla. St. U. L. Rev. 199 (1990). Indeed, the latter study specifically concluded that "[t]he Appeals Council as it now stands, . . . is buried in case files and *is unable to marshal its unique expertise or perspective*." Koch & Koplow, *supra*, at 319 (emphasis added). Significantly, within a few years after these studies, the SSA recommended abolishing the Appeals Council request for review step entirely as an exhaustion prerequisite to judicial review, *see* 59 Fed. Reg. 47,887, 47,917-18 (1994), and at present, is testing the Appeals Council's elimination by formal regulation in a variety of jurisdictions. *See* 20 C.F.R. §§ 404.966, 416.1466. Salient features of the Appeals Council's review process which support Koch & Koplow's conclusion and the SSA's subsequent actions, and which further demonstrate that prudential principles do not support SSA issue exhaustion, are described below.

a. *The primary Appeals Council review functions are performed by non-attorneys.* In evaluating the exercise of the Appeals Council's expertise, the Koch & Koplow study revealed that the Appeals Council's "primary review function" is now performed by non-attorney analysts in the Office of Appeals Operations (OAO). *See* Koch & Koplow, *supra*, at 240. These analysts "make recommendations which the Appeals Council members accept in the vast majority of instances." *Id.* The analyst's responsibilities include listening

"to the testimony of the medical advisor or vocational evidence to determine whether the ALJ's decision to deny benefits was based on substantial evidence." *Id.* at 253 n.289. The analyst must then "complete[ ] a three-page 'face sheet' form, checking appropriate boxes and filling blanks to reflect the salient characteristics of the claim and its handling by the ALJ." *Id.* at 253-54. The face sheet asks questions regarding unfavorable aspects of the ALJ's decision, whether the ALJ correctly assessed residual functional capacity, and the "legal basis the analyst identifies to support a recommendation." *Id.* at 254 n.290. Interestingly, "[t]he face sheet does not call for a narrative of the case *or the arguments of counsel.*" *Id.* (emphasis added). "The analyst then drafts a proposed decision and appropriate notification letters to the claimant." *Id.* at 254.

b. *Individual Appeals Council members devote less than fifteen minutes per case.* By the mid-1980s, the twenty member Appeals Council annually disposed of a staggering 50,000 cases per year. *See* ACUS Report, *supra*, at 49,143. That docket has more than doubled to 112,000 per year at present. *See* 63 Fed. Reg. 36,560, 36,561 (1998). In the 1980s, because of the demands on each member, "(up to 500 cases per member per month), a typical case [was] likely to receive less than 15 minutes of paper review by the members [and] the council almost never s[at] in panels or conduct[ed] oral arguments." ACUS Report, *supra*, at 49,143.

c. *The Appeals Council's denial letters generally are boilerplate and unresponsive to any issues raised.* As noted by Koch & Koplow, *supra*, at 290, "Appeals Council decisions are so standardized and non-responsive that they 'convince' no one; the review proceedings are so opaque that few claimants accept this process as a satisfying day in court." In 1995, the Appeals Council announced that it would "temporarily suspend" whatever remained of an apparent earlier prior practice of "including a specific response to contentions

and discussion of additional evidence in notices denying requests for review."[25] [26]

d. *The Appeals Council is prohibited from applying case law.* The SSA specifically prohibits ALJs and Appeals Council judges from applying case law in the adjudication of claims unless that case law is embodied in an acquiescence ruling ("AR"). An AR is an occasionally issued limited SSA ruling that only applies in limited jurisdictions and which explains the SSA's view as to specific issues recently decided by a circuit court. *See* 63 Fed. Reg. 24,927, 24,931 (1998). As the SSA explained:

> [I]f each of the agency's 15,000 adjudicators were permitted to apply his or her own interpretation of a circuit court decision in resolving these difficult questions, rather than relying on guidance from the Commissioner in the form of an AR, it could result in conflicting standards being used by decision makers, even within the same circuit. . . . In addition, adjudicators at the initial and reconsideration levels of review generally do not have any legal training in interpreting and applying circuit court

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[25] *See* Dubin, *supra*, at 1329 n.192 (quoting Letter from William C. Traylor, Executive Director, Office of Appellate Operations, Social Security Administration Appeals Council, to Nancy Shor, Executive Director of the National Organization of Social Security Claimants' Representatives, July 28, 1995). The Appeals Council's OAO executive director, William Traylor stated: "As you know, we are again facing unprecedented workloads at the Appeals Council and we believe that these procedural changes will help us keep cases moving as quickly as possible." Dubin, *supra*, at n.193 (quoting William Traylor at 2).

[26] Even in the 1980s, most requests for review culminated in boilerplate form denials of review, only 5% of cases reviewed resulted in reversals, and another 10% resulted in remands to the ALJ. *See* Koch & Koplow, *supra*, at 238. Present statistics reveal that the Appeals Council reverses in only 2.1% of cases and remands cases only 18% of the time. *See* Key Workload Indicators: Hearings, Appeals-Civil Actions-Attorneys Fees, Fiscal Year 1998, Social Security Administration Office of Hearings and Appeal at 23.

> decisions. If authority to apply circuit court decisions in the absence of an AR was extended only to ALJs and the Appeals Council, it would further undermine uniformity in decisionmaking by creating different standards of adjudication at different levels of review.

Id.

However, by adhering to this policy, the agency has simply transferred the task of interpreting the interrelationship between the regulations and the case law to the federal courts, as the number of AR issued are minimal compared with the number of significant circuit court decisions issued each year. Thus, not only do the courts have authority to apply an entire body of law – judicial decisions – that the agency cannot consider but, not surprisingly, the courts tend to accord great solicitude to the judicial form of law in SSA judicial review actions. *See generally Steiberger v. Sullivan*, 738 F. Supp. 716 (S.D.N.Y. 1990) (SSA's issuance of acquiescence rulings did not cure illegal ongoing policy of "non-acquiescence" – deliberately disregarding circuit court SSA precedent).

3. SSA issue exhaustion does not provide for more efficient judicial review by permitting the parties to develop the facts in the agency proceedings.

Issue exhaustion does not promote more efficient judicial review that follows from the parties' development of facts in the agency proceedings. Because Congress has specifically restricted the consideration of new facts on judicial review of SSA proceedings, with the exception of its authority to remand for new and material evidence under § 405(g) (sentence six), issue exhaustion is not needed to ensure that fact-finding will occur in agency proceedings and not during judicial review. It is highly unlikely that issue exhaustion would promote significantly more efficient judicial review through the development and analysis of legal issues due to (1) the fast-paced, multifaceted nature of the ALJ hearings;

(2) the generally non-responsive, boilerplate manner of non-attorney-led Appeals Council review; and (3) the prohibition on applying case law at all levels of administrative review.

4. SSA issue exhaustion does not meaningfully promote judicial economy by avoiding needless repetition of administrative and judicial fact-finding and by mooting judicial controversies.

As discussed above, § 405(g) specifically averts the problem of a repetition of fact finding. Further, while greater comprehensive development of legal issues in SSA proceedings might obviate the need for judicial review in some cases, as also discussed above, the nature and manner of those proceedings suggest that very few additional cases would be mooted from such a requirement. Chief Judge Posner characterized the Appeals Council as "operat[ing] more like a complaint bureau" than like a true appellate body. *See Johnson*, 189 F.3d at 563. His characterization is shared by Congress.[27]

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[27] *See, e.g.*, Staff of House of Representatives Comm. on Ways and Means, 93d Cong. Report on Disability Insurance Program, at 39 (1974) ("The Report stated that the Appeals Council should be made a true appellate administrative court for social security claimants."); Staff of House of Representatives Comm. on Ways and Means, 97th Cong., 1st Sess., Social Security Hearings and Appeals: Pending Problems and Proposed Solutions, at 13 (Comm. Print. 1981) ("[T]here has been a lot of criticism of the Appeals Council as presently constituted . . . [including] . . . charges that it is merely a bureaucratic layer rather than an entity carrying out a legitimate function"); *Id.* at 13-14 (recommending establishment of "a statutory base for a Review Board which would generally carry out the functions of the Appeals Council but in a more effective manner"). Judge Posner had much earlier pointed out the need for meaningful administrative reform of the Appeals Council if the SSA were to truly address judicial economy concerns. *See* Robert E. Rains, *A Specialized Court for Social Security? A Critique of Recent Proposals*, 15 Fla. St. L. Rev. 1, 26 and n.163 (1987) (quoting R. Posner, *The Federal Courts Crisis & Reform*, 161 (1985)) ("Judge Posner has suggested that it would be easier and cheaper [than creating an Article I Social Security

Moreover, a variety of new judicial controversies centered on procedural issues would more than compensate for issues precluded on the merits.

5. SSA issue exhaustion does not protect the parties from unfair surprise or ambush through the assertion of new issues on judicial review.

In sharp contrast to adversarial adjudication, the SSA or "opposing party" (as distinct from the decision maker) is neither present nor represented in SSA cases until an action is filed in federal district court seeking judicial review. Thus, there is no possibility of prejudice or unfairness to opposing counsel from having to alter positions or introduce new evidence to respond to "surprise" issues raised by the claimant until those new issues are raised on appeal from the district court to the court of appeals. In that situation, the formal doctrines of appellate procedure would ordinarily bar consideration of the new issue on appeal.

6. Even if meaningful prudential purposes for SSA issue exhaustion could be ascertained, prudential exceptions would excuse exhaustion in light of the SSA's operational reality.

In short, Appeals Council review can be generally summarized as follows: a claimant who lacks attorney representation nearly half of the time,[28] will request review, often on a one-page, three-line form provided to the claimant by the agency by regulation to accomplish the request for review. The request typically will then be analyzed and disposed of by an analyst with no legal training and then adopted by an

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Court] for Congress to create at the Appeals Council level, a tier of credible appellate administrative judges who would write opinions in all but frivolous cases").

[28] *See* Key Workload Indicators, FY 1998 ("57.4% of all the dispositions in FY 1998 had attorney involvement").

Appeals Council judge who is prohibited from considering or applying case law after a ten to fifteen minute review of the non-lawyer analyst's work. After "a delay of more than one year,"[29] the process generally culminates in a one-page, non-responsive form letter denial of review. Under these circumstances, it is hard to imagine what important purposes are served by requiring claimants, whether or not represented by counsel, to develop fully any and all legal issues and arguments to the Appeals Council to preserve them for judicial review.[30] However, even if a meaningful prudential basis could be discerned, the futility, legal issue, exceptional circumstances, manifest injustice, and issue raised by other party

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[29] Charles T. Hall, *Social Security Disability Practice* § 4.4 (Appeals Council) (West 1999 ed.); Commissioner Apfel has recently confirmed this conclusion. *See* Statement by Kenneth S. Apfel regarding Disability Oversight to the Committee on Ways and Means, Subcommittee on Social Security and Human Resources at 7, Oct. 21, 1999, attached to Reply to Opp'n Cert.

[30] Other than an unpublished Magistrate's Report, the SSA's only suggestion of precedent supporting prudential justifications for SSA issue exhaustion is the Tenth Circuit's opinion in *James v. Chater*, 96 F.3d 1341, 1344 (10th Cir. 1996). *See* Opp'n Cert. at 5-6. However, the Tenth Circuit's opinion in *James* reflects a profound lack of awareness of the true nature of Appeals Council review. In *James*, the court noted that the claimant's request for administrative review form "which [did] not identify the issues with any particularity, effectively sandbags the Appeals Council" and deprives the court of the Appeals Council's "informed views on those issues." 96 F.3d at 1344. If the agency has been "sandbagged," it has done so to itself by printing and encouraging the use of the very summary appeal form that facilitates perfunctory "informal, non-adversarial" appeals. Moreover, the court, in lamenting the absence of the Appeals Council's "informed views," was also apparently unaware of the Appeals Council's *policy* of providing non-responsive, summary denials. More critical, however, is the Tenth Circuit's recent admission that its prior decision in *James* is "on questionable footing" in light of *Harwood* and *Johnson*. *Jones v. Apfel*, No. 99-7039, 2000 WL 3875 n.1 (10th Cir. Jan. 4, 2000).

exceptions would excuse exhaustion under these circumstances.[31]

D. THE SSA PROVIDES MISLEADING AND DECEPTIVE NOTICE OF THE NEED TO EXHAUST ISSUES WITH SPECIFICITY TO PRESERVE THOSE ISSUES FOR JUDICIAL REVIEW, VIOLATING BASIC PRINCIPLES OF EQUITY AND DUE PROCESS.

Even if the application of *ad hoc* common law issue exhaustion were not foreclosed by the Act, its regulations and overall administrative scheme, and even if issue exhaustion could be found to serve meaningful prudential purposes and not fall within settled prudential exhaustion exceptions, the SSA's argument would still fail. The SSA holds out the promise of informality and non-adversarial assistance on administrative review through its regulations, forms, and rules widely advertised to claimants. However, claimants are

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[31] Since a large proportion of arguments made to the court are based on case law which the agency is prohibited from considering, presentation of those issues to the agency would be futile. The legal issue exception should also apply since virtually all of the issues presented to the Appeals Council are legal issues as the Appeals Council reviews cases under a similar deferential standard of review as the courts. *See* 20 C.F.R. §§ 404.970, 416.1470. Requiring comprehensive issue exhaustion of legal issues to non-lawyer analysts and to Appeals Council members who will devote less than 15 minutes per case, in cases where the agency's regulations and forms encourage a *pro forma* request for review, further presents "exceptional circumstances" which render the application of issue exhaustion to SSA proceedings a "manifest injustice." Finally, in light of the non-adversarial, informal nature of the proceedings, the ALJ and Appeals Council are independently required to identify issues and review or develop the full record in all cases. They should be deemed to have constructively raised or considered applicable issues, whether or not those issues were expressly raised by the claimants. *See Harwood*, 186 F.3d at 1042-43; *Weinke*, 1997 U.S. App. LEXIS at *11-12 (Reinhardt, J., dissenting).

then punished on judicial review for following those regulations and forms when the SSA turns around and seeks dismissal of issues which have not been specifically and formally raised and preserved. The SSA's deceptive and misleading conduct violates basic principles of equity and procedural due process, thereby excusing any arguable procedural default.

Consistent with the Act's clear intent, SSA's regulations explicitly provide that the Appeals Council will "conduct the administrative review process in an informal, non-adversarial manner." *See* 20 C.F.R. §§ 404.900(b), 416.1400(b). The SSA's seriousness about advertising the informality of Appeals Council review is underscored by SSA regulations which widely publicize the availability of a one-page SSA form to facilitate the request for review – Form HA-520. *See* 20 C.F.R. § 422.205(a). This form is available at all local Social Security offices, *see id.*, and it provides "only a space of three lines (roughly two-inches in total) for the statement of the issues and grounds for appeal." *Johnson*, 189 F.3d at 563. It contains no warning that failing to raise specific issues in the three lines provided, waives review of those issues by the courts. *Harwood*, 186 F.3d at 43; *Weinke*, 1997 U.S. App. LEXIS at *10-11 (the form "does not even advise the applicant to raise all issues that constitute the basis for the appeal, and that, unlike most forms involving far less important rights, does not even advise claimants that they may include an attachment if more space is required").

In addition, while the SSA's notice of unfavorable hearing decision form provides other warnings, it fails to provide *any warning whatsoever* of the consequences of not raising an issue or argument before the Appeals Council. As the Eighth Circuit described:

> The ALJ's written decision denying benefits stated that the Appeals Council 'may review your case for any reason.' Further the decision warned Harwood that he could not obtain judicial review unless he first sought review by the Appeals Council, or unless the Council reviewed the decision on its own

> motion. Nowhere did it state that Harwood would forfeit issues not raised to the Council, and the ALJ's reassurance that the Council 'may review your case for any reason' misleadingly implies otherwise. In effect the Commissioner asks us to deny judicial review to those claimants who have relied upon the agency's own professed duty to proceed in an 'informal nonadversary manner.' We decline to do so.

Harwood, 186 F.3d at 1043. Thus, by advertising an informal, non-adversarial Appeals Council process, by encouraging claimants to present their issues in a three-line space, and by failing to provide an issue waiver warning along with the other appellate review warnings in the notice of unfavorable ALJ decision, the SSA's notice to claimants is not merely unclear; it is deceptive and misleading regarding the consequences of their administrative appeals.

This Court has suggested, in an analogous context, that the mere lack of "clear notice" of the consequences of failing to object to an issue in a Magistrate Judge's report, can preclude an assertion that the unpresented issue has been waived for further appellate review. *See Thomas v. Arn*, 474 U.S. 140, 155 (1985) (Application of issue waiver rule to Magistrate Judges' reports is a valid exercise of the courts' supervisory power and neither violates the Federal Magistrate's Act nor the Due Process Clause "at least when it incorporates clear notice to the litigants and an opportunity to seek an extension of time for filing objections . . . ").

In *James v. Chater*, the Tenth Circuit applied this "clear" or "adequate notice" concept to its enunciation of an SSA issue exhaustion rule. *James v. Chater*, 96 F.3d 1341, 1343-44 (10th Cir. 1996). It held that because of "due process concerns" over the absence of notice, it would only apply the rule prospectively. *Id.* In addition, claimants who are unrepresented before the agency must receive "adequate notice through such means as direct admonition" for a "waiver" to be enforced. *Id.* Represented claimants would be charged with

adequate notice based on clear published case law. *Id.* Significantly, the Tenth Circuit did not mention and was apparently unaware any of the aforementioned SSA regulations and rules or the informal nonadversarial nature of the SSA's statutory and regulatory scheme. *See Wilson v. Apfel*, No. Civ. A. 98-2529-JWL, 1999 WL 966296 at *4-7, n.1 (D. Kan. Oct. 19, 1999) (declining to follow *James* and specifically reserving the question of *James*' continued viability in light of a challenge based upon those SSA regulations).

In this Court, the SSA contests Ms. Sims' "due process" argument, claiming that since Ms. Sims was represented at the Appeals Council, she can be charged with clear notice of an issue exhaustion requirement pursuant to *James* based on the Fifth Circuit's decision in *Paul v. Shalala*, 29 F.3d 208, 210-11 (5th Cir. 1994). *See* Opp'n Cert. at 8-9. This argument presupposes two other steps as part of a three-step argument: (2) that Ms. Sims was also on notice that the SSA would ignore its widely announced policy of disregarding or not invoking circuit case law principles establishing new agency requirements – especially requirements, such as issue exhaustion, which are inconsistent with long-term agency practice – unless that case law is embodied in an SSA acquiescence ruling;[32] and (3) that *Paul* would be interpreted as requiring a strict and precise issue specification standard.[33]

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[32] *See* Section C2d above, pages 37-38, *supra*.

[33] The SSA cannot demonstrate that notice has been provided to claimants that the agency expects (and will turn around and claim in court) a requirement of strict specificity in determining whether issues are deemed "raised" before the Appeals Council based on *Paul*. Indeed, the Fifth Circuit's decision in *McQueen* appears to interpret *Paul* as announcing a requirement closer to quite general notice pleading as opposed to the code pleading suggested in *Sims*. *See McQueen v. Apfel*, 168 F.3d 152, 155 (5th Cir. 1999). As a general matter, the Courts of Appeals have long recognized that "[a] technical application of the rules of pleading is inappropriate to the informal proceedings provided in disability determinations." *Cannon v. Harris*, 651 F.2d 513, 519 (7th Cir. 1981) (quoting *King v. Califano*, 599 F.2d 597, 599 (4th Cir. 1979)).

Nevertheless, if mere "unclear" notice can preclude the SSA's assertion of issue waiver in certain circumstances, it follows, *a fortiori*, that the SSA's own deceptive and misleading notice on the consequences of failing to raise issues in the administrative proceedings, should more broadly prevent the SSA from escaping judicial review of those issues. As one court has observed: "The language in the instant case, although not complex or confusing, is more offensive than [unclear or confusing notice] because it serves to mislead and deceive the disability applicant and denies the applicant the right to make an intelligent and informed decision." *Dealy v. Heckler*, 616 F. Supp. 880, 887 (W.D. Mo. 1984); *see also Harwood*, 186 F.3d at 1043 (specifically holding that the SSA's notices "*misleadingly impl[y]*" that issue exhaustion is unnecessary).

1. The SSA's misleading and deceptive conduct violates basic equitable principles.

Misleading notice – as an act of commission rather than omission – raises stronger prudential and equitable considerations against applying a discretionary, prudential doctrine to bar claims by the victims of that deceptive notice. The legal maxim *commodum ex injuria sua nemo habere debet*, *see Black's Law Dictionary* 249 (5th ed. 1979), expresses the common sense equitable proposition that no party should profit from his own wrong and has been held to apply in SSA cases. For example, in *Bowen v. City of New York*, 476 U.S. 467 (1986), a unanimous Court held that the SSA's "fixed clandestine policy against those with mental illness" justified the district court's equitable tolling of the express 60-day time limits for appealing to the next exhaustion step in the agency's three-step administrative review process and for seeking judicial review of a final decision pursuant to § 405(g). *Id.* at 479-82. If the Court can compel the SSA's forfeiture of express statutory and regulatory exhaustion requirements based on equitable principles, it follows, *a fortiori*, that the courts should compel a similar forfeiture of a

solely "prudential" issue exhaustion requirement on equitable grounds.

The SSA apparently concedes that its failure to raise the issue exhaustion argument would amount to a waiver. *See* Opp'n Cert. at 9. Significantly, the SSA asserts in this Court that since the SSA has a policy of generally not raising issue exhaustion in cases where claimants were unrepresented in the agency proceedings, few if any unrepresented claimants should be injured by the application of an issue exhaustion rule. *Id.* The Seventh Circuit (prior to *Johnson*) at least implicitly relied on equitable principles by holding that SSA can be deemed to have forfeited the right to claim an issue waiver by raising the waiver argument in an untimely fashion. *See Nolen v. Sullivan*, 939 F.2d 516, 519 (7th Cir. 1991). Indeed, the Tenth Circuit in *Jones* specifically held that the SSA waived its right to raise issue exhaustion where it failed to object to the U.S. Magistrate Judge's Report and Recommendation that considered the issues on the merits. *Jones v. Apfel*, No. 99-7039, 2000 WL 3875 (10th Cir. Jan. 4, 2000). It follows, *a fortiori*, that equitable principles should mandate a similar forfeiture of the SSA's issue exhaustion argument when the agency affirmatively facilitated the claimant's "waiver"[34] through deceptive and misleading conduct. Thus, even accepting, *arguendo*, the SSA's apparent three-step argument, the SSA's intervening, misleading and deceptive conduct through the use of notices and forms, neither evaluated in *Paul* nor *James*, should preclude the SSA from relying on the doctrine.

Indeed, the SSA implicitly concedes some degree of inequity from its reliance on issue exhaustion in light of its misleading forms since it now plans to change one of its

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[34] Moreover, under these circumstances, characterizing the claimant's failure to raise an issue before the agency as a "waiver" seems misplaced. *Cf. Johnson v. Zerbst*, 304 U.S. 458, 464 (1938) (holding in another context that a waiver is "an intentional relinquishment or abandonment of a known right").

forms. Specifically, SSA has informed this Court that it intends to amend the appointment of representative form which "in the future will advise the claimant's representative that the failure to present an issue to the Appeals Council may preclude the claimant from raising the issue upon judicial review of the agency's decision." Opp'n Cert. at 11-12. Unless and until the SSA completes that promised amendment and rescinds similarly misleading forms and rules, and enacts appropriate and consistent rules and regulations, SSA issue exhaustion should be barred on equitable grounds.

2. The SSA's misleading and deceptive conduct violates procedural due process.

Because this case is easily resolvable on non-constitutional grounds, this Court should adhere to its well-established policy of avoiding resolution of constitutional questions when not necessary to the decision of the case. *See Minnesota v. National Tea Co.*, 309 U.S. 551, 555 (1940); *Ashwander v. Tennessee Valley Auth.*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring). However, should resolution of the constitutional issue be deemed necessary, the remaining section demonstrates that the SSA's misleading and deceptive conduct also violates established procedural due process norms.

Misleading notice presents more serious procedural due process concerns than mere unclear notice by undermining principles of fundamental fairness and by introducing a higher risk of error into the adjudicative process. An SSA claimant's cause of action for judicial review, like other causes of action, "is a species of property protected by the . . . Due Process Clause." *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 428-29 (1985) (citation omitted). In *Logan*, the Court noted that it has "traditionally held that the Due Process Clauses protect civil litigants in the courts, [including] . . . plaintiffs seeking to redress grievances," 455 U.S. at 429 (citations omitted), and it "has read the 'property' component of the Fifth Amendment's Due Process Clause to

impose constitutional limitations upon the power of courts, even in the aid of their own valid processes, to dismiss an action without affording a party the opportunity for a hearing on the merits of his cause." *Id.* (citations omitted). Moreover, in SSA benefit application cases, the Court has also recognized the "long established" proposition, that "procedural due process is applicable to the adjudicative administrative proceeding through 'the differing rules of fair play, which through the years have become associated with differing types of proceedings.' " *Perales*, 402 U.S. at 401-02; *see also Heckler v. Campbell*, 461 U.S. 458, 468-69 (1983).

In evaluating procedural due process claims, the Court has established a three-factor calculus or balancing test for determining what process is due. First, the court must balance the private interest affected by the agency action; second, it must assess the risk of erroneous deprivation of such interest through the present procedure and the probable value of an alternate procedure; and third, it must balance the government interest and administrative burdens that an alternate notice or procedure would impose. *See Eldridge*, 424 U.S. at 335. For the reasons developed comprehensively in Dubin, *supra*, at 1335-39, all three factors strongly support a procedural due process bar to the application of issue exhaustion in SSA cases.

CONCLUSION

Based on the foregoing, the application of issue exhaustion in the Social Security context is not only unquestionably inappropriate from a jurisdictional perspective, but it is likewise misapplied to SSA proceedings as a judicially created prudential principle. Therefore, the decision of the United States Court of Appeal for the Fifth Circuit should be reversed and the case remanded to the Fifth Circuit for consideration of the merits of Petitioner's previously dismissed arguments.

Respectfully submitted,

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January 20, 2000

APPENDIX

STATUTORY PROVISIONS

42 U.S.C. § 405 Evidence, procedure, and certification for payments.

(a) Rules and regulations; procedures.

The Commissioner of Social Security shall have full power and authority to make rules and regulations and to establish procedures, not inconsistent with the provisions of this subchapter, which are necessary or appropriate to carry out such provisions, and shall adopt reasonable and proper rules and regulations to regulate and provide for the nature and extent of the proofs and evidence and the method of taking and furnishing the same in order to establish the right to benefits hereunder.

(g) Judicial review.

Any individual, after any final decision of the Commissioner of Social Security made after a hearing to which he was a party, irrespective of the amount in controversy, may obtain a review of such decision by a civil action commenced within sixty days after the mailing to him of notice of such decision or within such further time as the Commissioner of Social Security may allow. Such action shall be brought in the district court of the United States for the judicial district in which the plaintiff resides, or has his principal place of business, or, if he does not reside or have his principal place of business within any such judicial district, in the United States District Court for the District of Columbia. As part of the

Commissioner's answer the Commissioner of Social Security shall file a certified copy of the transcript of the record including the evidence upon which the findings and decision complained of are based. The court shall have power to enter, upon the pleadings and transcript of the record, a judgment affirming, modifying, or reversing the decision of the Commissioner of Social Security, with or without remanding the cause for a rehearing. The findings of the Commissioner of Social Security as to any fact, if supported by substantial evidence, shall be conclusive, and where a claim has been denied by the Commissioner of Social Security or a decision is rendered under subsection (b) of this section which is adverse to an individual who was a party to the hearing before the Commissioner of Social Security, because of failure of the claimant or such individual to submit proof in conformity with any regulation prescribed under subsection (a) of this section, the court shall review only the question of conformity with such regulations and the validity of such regulations. The court may, on motion of the Commissioner of Social Security made for good cause shown before the Commissioner files the Commissioner's answer, remand the case to the Commissioner of Social Security for further action by the Commissioner of Social Security, and it may at any time order additional evidence to be taken before the Commissioner of Social Security, but only upon a showing that there is new evidence which is material and that there is good cause for the failure to incorporate such evidence into the record in a prior proceeding; and the Commissioner of Social Security shall, after the case is remanded, and after hearing such additional evidence if so ordered, modify or affirm

the Commissioner's findings of fact or the Commissioner's decision, or both, and shall file with the court any such additional and modified findings of fact and decision, and a transcript of the additional record and testimony upon which the Commissioner's action in modifying or affirming was based. Such additional or modified findings of fact and decision shall be reviewable only to the extent provided for review of the original findings of fact and decision. The judgment of the court shall be final except that it shall be subject to review in the same manner as a judgment in other civil actions. Any action instituted in accordance with this subsection shall survive notwithstanding any change in the person occupying the office of Commissioner of Social Security or any vacancy in such office.

42 U.S.C. § 1383 Procedure for payment of benefits.

(c) Hearing to determine eligibility or amount of benefits; subsequent application; time within which to request hearing; time for determinations of Commissioner of Social Security pursuant to hearing; judicial review

(3) The final determination of the Commissioner of Social Security after a hearing under paragraph (1) shall be subject to judicial review as provided in section 405(g) of this title to the same extent as the Commissioner's final determinations under section 405 of this title.

REGULATIONS

20 C.F.R. § 404.900 Introduction.

(a) Explanation of the administrative review process. This subpart explains the procedures we follow in determining your rights under title II of the Social Security Act. The regulations describe the process of administrative review and explain your right to judicial review after you have taken all the necessary administrative steps. These procedures apply also to persons claiming certain benefits under title XVIII of the Act (Medicare); see 42 CFR 405.701(c). The administrative review process consists of several steps, which usually must be requested within certain time periods and in the following order:

(1) Initial determination. This is a determination we make about your entitlement or your continuing entitlement to benefits or about any other matter, as discussed in § 404.902, that gives you a right to further review.

(2) Reconsideration. If you are dissatisfied with an initial determination, you may ask us to reconsider it.

(3) Hearing before an administrative law judge. If you are dissatisfied with the reconsideration determination, you may request a hearing before an administrative law judge.

(4) Appeals Council review. If you are dissatisfied with the decision of the administrative law judge, you may request that the Appeals Council review the decision.

(5) Federal court review. When you have completed the steps of the administrative review process listed in

paragraphs (a)(1) through (a)(4) of this section, we will have made our final decision. If you are dissatisfied with our final decision, you may request judicial review by filing an action in a Federal district court.

(6) Expedited appeals process. At some time after your initial determination has been reviewed, if you have no dispute with our findings of fact and our application and interpretation of the controlling laws, but you believe that a part of the law is unconstitutional, you may use the expedited appeals process. This process permits you to go directly to a Federal district court so that the constitutional issue may be resolved.

(b) Nature of the administrative review process. In making a determination or decision in your case, we conduct the administrative review process in an informal, nonadversary manner. In each step of the review process, you may present any information you feel is helpful to your case. Subject to the limitations on Appeals Council consideration of additional evidence (see §§ 404.970(b) and 404.976(b)), we will consider at each step of the review process any information you present as well as all the information in our records. You may present the information yourself or have someone represent you, including an attorney. If you are dissatisfied with our decision in the review process, but do not take the next step within the stated time period, you will lose your right to further administrative review and your right to judicial review, unless you can show us that there was good cause for your failure to make a timely request for review.

20 C.F.R. § 404.940 Disqualification of the administrative law judge.

An administrative law judge shall not conduct a hearing if he or she is prejudiced or partial with respect to any party or has any interest in the matter pending for decision. If you object to the administrative law judge who will conduct the hearing, you must notify the administrative law judge at your earliest opportunity. The administrative law judge shall consider your objections and shall decide whether to proceed with the hearing or withdraw. If he or she withdraws, the Associate Commissioner for Hearings and Appeals, or his or her delegate, will appoint another administrative law judge to conduct the hearing. If the administrative law judge does not withdraw, you may, after the hearing, present your objections to the Appeals Council as reasons why the hearing decision should be revised or a new hearing held before another administrative law judge.

20 C.F.R. § 404.966 Testing elimination of the request for Appeals Council review.

(a) Applicability and scope. Notwithstanding any other provision in this part or part 422 of this chapter, we are establishing the procedures set out in this section to test elimination of the request for review by the Appeals Council. These procedures will apply in randomly selected cases in which we have tested a combination of model procedures for modifying the disability claim process as authorized under §§ 404.906 and 404.943, and in which an administrative law judge has issued a decision

(not including a recommended decision) that is less than wholly favorable to you.

(b) Effect of an administrative law judge's decision. In a case to which the procedures of this section apply, the decision of an administrative law judge will be binding on all the parties to the hearing unless –

(1) You or another party file an action concerning the decision in Federal district court;

(2) The Appeals Council decides to review the decision on its own motion under the authority provided in § 404.969, and it issues a notice announcing its decision to review the case on its own motion no later than the day before the filing date of a civil action establishing the jurisdiction of a Federal district court; or

(3) The decision is revised by the administrative law judge or the Appeals Council under the procedures explained in § 404.987.

(c) Notice of the decision of an administrative law judge. The notice of decision the administrative law judge issues in a case processed under this section will advise you and any other parties to the decision that you may file an action in a Federal district court within 60 days after the date you receive notice of the decision.

(d) Extension of time to file action in Federal district court. Any party having a right to file a civil action under this section may request that the time for filing an action in Federal district court be extended. The request must be in writing and it must give the reasons why the action was not filed within the stated time period. The request must be filed with the Appeals Council. If you

show that you had good cause for missing the deadline, the time period will be extended. To determine whether good cause exists, we will use the standards in § 404.911.

20 C.F.R. § 404.975 Filing briefs with the Appeals Council.

Upon request, the Appeals Council shall give you and all other parties a reasonable opportunity to file briefs or other written statements about the facts and law relevant to the case.

20 C.F.R. § 404.976 Procedures before Appeals Council on Review.

(a) Limitation of issues. The Appeals Council may limit the issues it considers if it notifies you and the other parties of the issues it will review.

(b) Evidence.

(1) The Appeals Council will consider all the evidence in the administrative law judge hearing record as well as any new and material evidence submitted to it which relates to the period on or before the date of the administrative law judge hearing decision. If you submit evidence which does not relate to the period on or before the date of the administrative law judge hearing decision, the Appeals Council will return the additional evidence to you with an explanation as to why it did not accept the additional evidence and will advise you of your right to file a new application. The notice returning the evidence

to you will also advise you that if you file a new application within 6 months after the date of the Appeals Council's notice, your request for review will constitute a written statement indicating an intent to claim benefits in accordance with § 404.630. If a new application is filed within 6 months of this notice, the date of the request for review will be used as the filing date for your application.

(2) If additional evidence is needed, the Appeals Council may remand the case to an administrative law judge to receive evidence and issue a new decision. However, if the Appeals Council decides that it can obtain the evidence more quickly, it may do so, unless it will adversely affect your rights.

(c) Oral argument. You may request to appear before the Appeals Council to present oral argument. The Appeals Council will grant your request if it decides that your case raises an important question of law or policy or that oral argument would help to reach a proper decision. If your request to appear is granted, the Appeals Council will tell you the time and place of the oral argument at least 10 days before the scheduled date.

20 C.F.R. § 416.1400 Introduction.

(a) Explanation of the administrative review process. This subpart explains the procedures we follow in determining your rights under title XVI of the Social Security Act. The regulations describe the process of administrative review and explain your right to judicial review after you have taken all the necessary administrative steps. The administrative review process consists of

several steps, which usually must be requested within certain time periods and in the following order:

(1) Initial determination. This is a determination we make about your eligibility or your continuing eligibility for benefits or about any other matter, as discussed in § 416.1402, that gives you a right to further review.

(2) Reconsideration. If you are dissatisfied with an initial determination, you may ask us to reconsider it.

(3) Hearing before an administrative law judge. If you are dissatisfied with the reconsideration determination, you may request a hearing before an administrative law judge.

(4) Appeals Council review. If you are dissatisfied with the decision of the administrative law judge, you may request that the Appeals Council review the decision.

(5) Federal court review. When you have completed the steps of the administrative review process listed in paragraphs (a)(1) through (a)(4) of this section, we will have made our final decision. If you are dissatisfied with our final decision, you may request judicial review by filing an action in a Federal district court.

(6) Expedited appeals process. At some time after your initial determination has been reviewed, if you have no dispute with our findings of fact and our application and interpretation of the controlling laws, but you believe that a part of the law is unconstitutional, you may use the expedited appeals process. This process permits you to go directly to a Federal district court so that the constitutional issue may be resolved.

(b) Nature of the administrative review process. In making a determination or decision in your case, we conduct the administrative review process in an informal, nonadversary manner. In each step of the review process, you may present any information you feel is helpful to your case. Subject to the limitations on Appeals Council consideration of additional evidence (see §§ 416.1470(b) and 416.1476(b)), we will consider at each step of the review process any information you present as well as all the information in our records. You may present the information yourself or have someone represent you, including an attorney. If you are dissatisfied with our decision in the review process, but do not take the next step within the stated time period, you will lose your right to further administrative review and your right to judicial review, unless you can show us that there was good cause for your failure to make a timely request for review.

20 C.F.R. § 416.1440 Disqualification of the administrative law judge.

An administrative law judge shall not conduct a hearing if he or she is prejudiced or partial with respect to any party or has any interest in the matter pending for decision. If you object to the administrative law judge who will conduct the hearing, you must notify the administrative law judge at your earliest opportunity. The administrative law judge shall consider your objections and shall decide whether to proceed with the hearing or withdraw. If he or she withdraws, the Associate Commissioner for Hearings and Appeals, or his or her delegate,

will appoint another administrative law judge to conduct the hearing. If the administrative law judge does not withdraw, you may, after the hearing, present your objections to the Appeals Council as reasons why the hearing decision should be revised or a new hearing held before another administrative law judge.

20 C.F.R. § 416.1466 Testing elimination of the request for Appeals Council review.

(a) Applicability and scope. Notwithstanding any other provision in this part or part 422 of this chapter, we are establishing the procedures set out in this section to test elimination of the request for review by the Appeals Council. These procedures will apply in randomly selected cases in which we have tested a combination of model procedures for modifying the disability claim process as authorized under §§ 416.1406 and 416.1443, and in which an administrative law judge has issued a decision (not including a recommended decision) that is less than wholly favorable to you.

(b) Effect of an administrative law judge's decision. In a case to which the procedures of this section apply, the decision of an administrative law judge will be binding on all the parties to the hearing unless –

(1) You or another party file an action concerning the decision in Federal district court;

(2) The Appeals Council decides to review the decision on its own motion under the authority provided in § 416.1469, and it issues a notice announcing its decision to review the case on its own motion no later than the day

before the filing date of a civil action establishing the jurisdiction of a Federal district court; or

(3) The decision is revised by the administrative law judge or the Appeals Council under the procedures explained in § 416.1487.

(c) Notice of the decision of an administrative law judge. The notice of decision the administrative law judge issues in a case processed under this section will advise you and any other parties to the decision that you may file an action in a Federal district court within 60 days after the date you receive notice of the decision.

(d) Extension of time to file action in Federal district court. Any party having a right to file a civil action under this section may request that the time for filing an action in Federal district court be extended. The request must be in writing and it must give the reasons why the action was not filed within the stated time period. The request must be filed with the Appeals Council. If you show that you had good cause for missing the deadline, the time period will be extended. To determine whether good cause exists, we will use the standards in § 416.1411.

20 C.F.R. § 416.1475 Filing briefs with the Appeals Council.

Upon request, the Appeals Council shall give you and all other parties a reasonable opportunity to file briefs or other written statements about the facts and law relevant to the case. A copy of each brief or statement should be filed for each party.

20 C.F.R. § 416.1476 Procedures before Appeals Council on review.

(a) Limitation of issues. The Appeals Council may limit the issues it considers if it notifies you and the other parties of the issues it will review.

(b) Evidence.

(1) In reviewing decisions based on an application for benefits, the Appeals Council will consider the evidence in the administrative law judge hearing record and any new and material evidence only if it relates to the period on or before the date of the administrative law judge hearing decision. If you submit evidence which does not relate to the period on or before the date of the administrative law judge hearing decision, the Appeals Council will return the additional evidence to you with an explanation as to why it did not accept the additional evidence and will advise you of your right to file a new application. The notice returning the evidence to you will also advise you that if you file an application within 60 days after the date of the Appeals Council's notice, your request for review will constitute a written statement indicating an intent to claim benefits in accordance with § 416.340. If a new application is filed within 60 days of this notice, the date of the request for review will be used as the filing date for your application.

(2) In reviewing decisions other than those based on an application for benefits, the Appeals Council will consider the evidence in the administrative law judge hearing record and any additional evidence it believes is material to an issue being considered.

(3) If additional evidence is needed, the Appeals Council may remand the case to an administrative law judge to receive evidence and issue a new decision. However, if the Appeals Council decides that it can obtain the evidence more quickly, it may do so, unless it will adversely affect your rights.

(c) Oral argument. You may request to appear before the Appeals Council to present oral argument. The Appeals Council will grant your request if it decides that your case raises an important question of law or policy or that oral argument would help to reach a proper decision. If your request to appear is granted, the Appeals Council will tell you the time and place of the oral argument at least 10 days before the scheduled date.

20 C.F.R. § 422.205 Review by Appeals Council.

(a) Any party to a hearing decision or dismissal may request a review of such action by the Appeals Council. The Health Care Financing Administration or, as appropriate, the Office of the Inspector General is a party to a hearing on a determination under § 422.203 (a)(2) and (a)(3) and to administrative appeals involving matters under section 1128(b)(6) of the Act (see § 42 CFR 498.42). This request may be made on Form HA-520, "Request for Review of Hearing Decision/Order," or by any other writing specifically requesting review. Form HA-520 may be obtained from any social security district office or branch office, from the Office of Hearings and Appeals Social Security Administration, P.O. Box 3200, Arlington, VA 22203, or at any other office where a request for a hearing may be filed. (For time and place of

filing, see §§ 404.968, 410.661, and 416.1468 of this chapter, and § 42 CFR 405.724, § 498.82 and 417.261.)

(b) Whenever the Appeals Council reviews a hearing decision under §§ 404.967 or 404.969, 410.662, 416.1467, or 416.1469 of this chapter, or § 42 CFR 405.724 or 417.261 or § 473.46 and the claimant does not appear personally or through representation before the Council to present oral argument, such review will be conducted by a panel of not less than two members of the Council designated in the manner prescribed by the Chairman or Deputy Chairman of the Council. In the event of disagreement between a panel composed of only two members, the Chairman or Deputy Chairman, or his delegate, who must be a member of the Council, shall participate as a third member of the panel. When the claimant appears in person or through representation before the Council in the location designated by the Council, the review will be conducted by a panel of not less than three members of the Council designated in the manner prescribed by the Chairman or Deputy Chairman. Concurrence of a majority of a panel shall constitute the decision of the Appeals Council unless the case is considered as provided under paragraph (e) of this section.

(c) The denial of a request for review of a hearing decision concerning a determination under § 422.203(a)(1) shall be by such appeals officer or appeals officers or by such member or members of the Appeals Council as may be designated in the manner prescribed by the Chair or Deputy Chair. The denial of a request for review of a hearing dismissal, the dismissal of a request for review, the denial of a request for review of a hearing decision whenever such hearing decision after such denial would not be

subject to judicial review as explained in § 422.210(a), or the refusal of a request to reopen a hearing or Appeals Council decision concerning a determination under § 422.203(a)(1) shall be by such member or members of the Appeals Council as may be designated in the manner prescribed by the Chair or Deputy Chair.

(d) A review or a denial of review of a hearing decision or a dismissal of a request for review with respect to requests by parties under § 42 CFR 498.82 or 1001.128 in accordance with § 498.83 will be conducted by a panel of at least two members of the Appeals Council designated by the Chairman or Deputy Chairman and one person from the U.S. Public Health Service designated by the Surgeon General, Public Health Service, Department of Health and Human Services, or his delegate. This person shall serve on an ad hoc basis and shall be considered for this purpose as a member of the Appeals Council. Concurrence of a majority of the panel shall constitute the decision of the Appeals Council unless the case is considered as provided under paragraph (e) of this section.

(e) On call of the Chairman, the Appeals Council may meet en banc or a representative body of Appeals Council members may be convened to consider any case arising under paragraph (b), (c), or (d) of this section. Such representative body shall be comprised of a panel of not less than five members designated by the Chairman as deemed appropriate for the matter to be considered, including a person from the U.S. Public Health Service in a matter under paragraph (d) of this section. The Chairman or Deputy Chairman shall preside, or in his absence, the Chairman shall designate a member of the Appeals

Council to preside. A majority vote of the designated panel, or of the members present and voting shall constitute the decision of the Appeals Council.

(f) The Chairman may designate an administrative law judge to serve as a member of the Appeals Council for temporary assignments. An administrative law judge shall not be designated to serve as a member on any panel where such panel is conducting review on a case in which such individual has been previously involved.

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(8)

Supreme Court, U.S.
FILED
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No. 98-9537

In the Supreme Court of the United States

JUATASSA SIMS, PETITIONER

v.

KENNETH S. APFEL, COMMISSIONER OF SOCIAL SECURITY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT

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QUESTION PRESENTED

Whether the court of appeals properly declined to address two of petitioner's three claims of error on the ground that petitioner had failed to present those claims to the Social Security Administration's Appeals Council.

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In the Supreme Court of the United States

No. 98-9537

JUATASSA SIMS, PETITIONER

v.

KENNETH S. APFEL, COMMISSIONER OF SOCIAL SECURITY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT

OPINIONS BELOW

The opinion of the court of appeals (J.A. 85-86) is reported at 200 F.3d 229. The judgment of the district court (J.A. 83-84) is unreported. The report and recommendation of the magistrate judge (J.A. 74-82) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on November 6, 1998. A petition for rehearing was denied on February 18, 1999 (J.A. 87). The petition for a writ of certiorari was filed on May 19, 1999, and was granted on November 29, 1999. 120 S. Ct. 525 (J.A. 88). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATEMENT

1. Title II of the Social Security Act, 42 U.S.C. 301 *et seq.* (Act), provides for the payment of monthly benefits to disabled persons who have contributed to the program. 42 U.S.C. 401-433 (1994 & Supp. III 1997). Title XVI of the Act provides for the payment of disability benefits to certain indigent persons under the Supplemental Security Income Program. 42 U.S.C. 1382 (1994 & Supp. III 1997). The Act defines "disability" as the "inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months." 42 U.S.C. 423(d)(1)(A); 42 U.S.C. 1382c(a)(3)(A). The Commissioner of Social Security[1] has promulgated detailed regulations governing both the substantive standards to be applied in determining eligibility under the program, and the procedures for adjudicating individual disability claims.

a. The substantive standards for determining whether an adult person is disabled are embodied in a five-step sequential evaluation process. See 20 C.F.R. 404.1520-404.1576.[2] As this Court explained in *Sullivan* v. *Zebley*, 493 U.S. 521 (1990):

[1] The Social Security Independence and Program Improvements Act of 1994, Pub. L. No. 103-296, § 106(d), 108 Stat. 1476, transferred the administration of the Social Security program from the Secretary of Health and Human Services to the Commissioner of Social Security.

[2] The regulations discussed in the text are applicable to the Title II disability program. The parallel regulations governing the Title XVI program appear at 20 C.F.R. 416.920-416.976.

> The first two steps involve threshold determinations that the claimant is not presently working and has an impairment which is of the required duration and which significantly limits his ability to work. [20 C.F.R. 404.1520(b) and (c).] In the third step, the medical evidence of the claimant's impairment is compared to a list of impairments presumed severe enough to preclude any gainful work. [20 C.F.R. Pt. 404, Subpt. P, App. 1 (Pt. A).] If the claimant's impairment matches or is "equal" to one of the listed impairments, he qualifies for benefits without further inquiry. [20 C.F.R. 404.1520(d).] If the claimant cannot qualify under the listings, the analysis proceeds to the fourth and fifth steps. At these steps, the inquiry is whether the claimant can do his own past work or any other work that exists in the national economy, in view of his age, education, and work experience. If the claimant cannot do his past work or other work, he qualifies for benefits. [20 C.F.R. 404.1520(e) and (f).]

Id. at 525-526; see also *Bowen* v. *Yuckert*, 482 U.S. 137, 141-142 (1987).

b. "To facilitate the orderly and sympathetic administration of the disability program of Title II, the [Commissioner] and Congress have established an unusually protective [administrative] process for the review and adjudication of disputed claims." *Heckler* v. *Day*, 467 U.S. 104, 106 (1984); see also *id.* at 106-107 (describing administrative scheme); *Yuckert*, 482 U.S. at 142 (same); *Bowen* v. *City of New York*, 476 U.S. 467, 471-472 (1986) (same); 20 C.F.R. 404.900 (same).[3] If it is determined at any stage of the process that the individ-

[3] The parallel procedural regulations governing adjudication of Title XVI claims appear at 20 C.F.R. 416.903, 416.1400 *et seq.*

ual is eligible for benefits, he is entitled to retroactive payments for the period of his eligibility, beginning no more than 12 months prior to the filing of the application for benefits. *Schweiker* v. *Hansen*, 450 U.S. 785, 786-787 (1981). See also *Mathews* v. *Eldridge*, 424 U.S. 319, 339 (1976) (termination of benefits).

The initial determination whether a particular individual is eligible for disability benefits is made by a state agency, acting under the authority of the Commissioner. 42 U.S.C. 421(a); 20 C.F.R. 404.1503. If the state agency makes an initial determination that the applicant is not disabled, the individual may request a de novo reconsideration by the state agency. 20 C.F.R. 404.904, 404.907-404.921.[4] If the request for reconsideration is unsuccessful, the claimant is entitled to a hearing before an administrative law judge (ALJ) within the Social Security Administration (SSA). 42 U.S.C. 405(b); 20 C.F.R. 404.929-404.961.

If the ALJ issues an adverse decision, the claimant may seek review by SSA's Appeals Council. See 20 C.F.R. 404.900(a)(4) ("If you are dissatisfied with the decision of the administrative law judge, you may request that the Appeals Council review the decision."); 20 C.F.R. 404.966-404.982 (Appeals Council procedures).[5] The Appeals Council was established in

[4] As part of its disability redesign initiative, the Social Security Administration (SSA) is currently testing possible modifications to the disability determination process. *Inter alia*, SSA is testing in 10 States the effect of eliminating the requirement that a claimant request reconsideration by the state agency before proceeding to the next step of the administrative process. See 20 C.F.R. 404.906; 60 Fed. Reg. 20,023-20,026 (1995); 64 Fed. Reg. 47,218-47,219 (1999).

[5] As part of its disability redesign initiative (see note 4, *supra*), SSA is currently testing in certain cases the elimination of the requirement that a claimant file a request for Appeals Council review before seeking relief in court. See 20 C.F.R. 404.966; 62 Fed. Reg. 49,598-49,602 (1997).

January 1940 by the Social Security Board, see 5 Fed. Reg. 4169, 4171-4174 (1940), based on a 1940 Report of the Social Security Board regarding the manner in which the hearing and review provisions in 42 U.S.C. 405 would be implemented. See Monograph of the Attorney General's Committee on Administrative Procedure, S. Doc. No. 10, 77th Cong., 1st Sess., Pt. 3 (Appendix) at 36, 39, 53-55 (1941); *Weinberger* v. *Salfi*, 422 U.S. 749, 759-760 n.6 (1975); Charles H. Koch, Jr. & David A. Koplow, *The Fourth Bite at the Apple: A Study of the Operation and Utility of the Social Security Administration's Appeals Council*, 17 Fla. St. U. L. Rev. 199, 234 (1990). The Appeals Council is chaired by the Associate Commissioner for Hearings and Appeals. *Id.* at 236; 60 Fed. Reg. 22,142 (1995). In fiscal year 1999, the Appeals Council received 115,151 requests for review and acted on 91,173 such requests. See Social Security Administration, Office of Hearings and Appeals, *Key Workload Indicators–Fiscal Year 1999* (*Key Workload Indicators*) at 21.[6] A request for review is typically considered by a panel of the Appeals Council, but the Appeals Council may consider a case en banc at the direction of the Chairman. See 20 C.F.R. 422.205(b) and (e).

"The Appeals Council may deny or dismiss the request for review, or it may grant the request and either issue a decision or remand the case to an administrative law judge." 20 C.F.R. 404.967; see also 20 C.F.R.

[6] The Appeals Council remanded 20,135 cases in fiscal year 1999 (22% of the 91,173 dispositions) and ordered an award of benefits in 1824 other cases (2.0%). *Key Workload Indicators* at 21.

404.981.[7] SSA regulations provide that, as a general matter, review by the Appeals Council is appropriate where (1) "[t]here appears to be an abuse of discretion by the [ALJ]"; (2) "[t]here is an error of law"; (3) "[t]he action, findings or conclusions of the [ALJ] are not supported by substantial evidence"; or (4) "[t]here is a broad policy or procedural issue that may affect the general public interest." 20 C.F.R. 404.970(a)(1)-(4). The Appeals Council's review is made on the basis of the record before the ALJ unless the claimant submits "new and material evidence" that "relates to the period on or before the date of the [ALJ] hearing decision." 20 C.F.R. 404.970(b); see also 20 C.F.R. 404.968(a) ("[a]ny documents or other evidence [the claimant] wish[es] to have considered by the Appeals Council should be submitted with [the] request for review"). If the claimant submits new evidence satisfying the regulatory criteria, the Appeals Council will consider the entire record, including the new evidence, and "will then review the case if it finds that the [ALJ's] action, findings, or conclusion is contrary to the weight of the evidence currently of record." 20 C.F.R. 404.970(b).

If the Appeals Council grants review, the claimant is given an "opportunity to file briefs or other written statements about the facts and law relevant to the case." 20 C.F.R. 404.975. The Appeals Council may choose to limit the issues that it will consider on review of the ALJ decision. 20 C.F.R. 404.976(a). The claimant may also request an opportunity to present oral argument, and such a request will be granted if the Appeals Council "decides that [the] case raises an important

[7] The Appeals Council is also authorized to review an ALJ decision on its own motion. 20 C.F.R. 404.969.

question of law or policy or that oral argument would help to reach a proper decision." 20 C.F.R. 404.976(c).

2. An unsuccessful applicant for disability benefits may seek judicial review in federal district court of "any final decision of the Commissioner of Social Security made after a hearing to which he was a party." 42 U.S.C. 405(g). The Social Security Act does not specify the point at which the Commissioner's decision becomes "final." SSA's regulations make clear, however, that, with exceptions not relevant here, an individual must file a request for review by the Appeals Council in order to obtain a "final decision" of the Commissioner. See 20 C.F.R. 404.900(a)(5), 404.955, 404.981; *City of New York*, 476 U.S. at 482.[8] If the Appeals Council denies review, the ALJ's decision becomes the agency's "final decision" and is then subject to judicial review. See 20 C.F.R. 422.210(a) ("A claimant may obtain judicial review of a decision by an administrative law judge if the Appeals Council has denied the claimant's request for review").[9] If the Appeals Council grants review and

[8] SSA has established an expedited appeals process under which claimants may obtain access to judicial review without full exhaustion of administrative remedies in cases where the only matter in controversy concerns the constitutionality of a provision of the Social Security Act. See 20 C.F.R. 404.900(a)(6), 404.923-404.928. In addition, SSA is currently testing the elimination of Appeals Council review in certain cases. 20 C.F.R. 404.966; see note 5, *supra*. The instant case does not implicate either of those exceptions to the general rule that a claimant must seek review by the Appeals Council in order to obtain a "final decision" of the Commissioner subject to judicial review under 42 U.S.C. 405(g).

[9] In that respect judicial review of SSA disability determinations is analogous to this Court's review of state court decisions under 28 U.S.C. 1257. Under that statute, the Court is authorized to review "[f]inal judgments or decrees of the highest court of a State in which a decision could be had." 28 U.S.C. 1257(a). To

issues its own decision in the case, that is the "final decision of the Commissioner." *Ibid.*[10]

3. On August 3, 1994, petitioner Juatassa Sims filed an application for disability benefits under Title II and Title XVI of the Act. J.A. 29. She alleged disability beginning April 1, 1992, due to a variety of medical problems, including degenerative joint disease of the lumbar spine and possible carpal tunnel syndrome. After the state agency denied petitioner's claim and her subsequent request for reconsideration, petitioner requested a hearing before an ALJ. Petitioner was represented by an attorney at the ALJ hearing. See *ibid.*

The ALJ denied petitioner's claim for benefits. J.A. 29-49. After reviewing the relevant medical evidence, the ALJ performed the five-step sequential-evaluation analysis described at pages 2-3, *supra*. (1) The ALJ noted that petitioner "ha[d] not engaged in substantial gainful activity since the alleged onset date, April 1, 1992." J.A. 30; see J.A. 40 (Finding No. 2). (2) The ALJ found that petitioner "has 'severe' impairments, [including] degenerative disc disease of the lumbar spine, thyroid enlargement, possible carpal tunnel syndrome, exogenous obesity, depression, borderline intellectual

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obtain review under Section 1257, a party who has received an unfavorable decision from an intermediate state appellate court must ordinarily seek discretionary relief from the highest court of the State. But if the highest state court denies review, it is the intermediate court's decision (rather than the order of the highest state court denying review) that is then subject to review in this Court. See, *e.g.*, *Michigan-Wisconsin Pipe Line Co.* v. *Calvert*, 347 U.S. 157, 159-160 (1954); Sup. Ct. R. 13.1.

[10] Alternatively, the Appeals Council may grant review and remand the case to the ALJ for further proceedings. See 20 C.F.R. 404.967.

functioning, and somatoform disorder." J.A. 36; see J.A. 40 (Finding No. 3). (3) The ALJ determined that "[b]ased on the record, [petitioner's] mental impairments and physical impairments do not meet or equal a listing in Appendix 1." J.A. 37; see J.A. 40 (Finding No. 3). The ALJ further found that petitioner "has the residual functional capacity to perform the physical exertion and nonexertional requirements of work except for being unable to lift more than 20 pounds and being unable to perform jobs precluded by mild to moderate difficulties with concentration and attention." J.A. 40 (Finding No. 5); see J.A. 37 (stating that petitioner is unable to "lift[] heavy weights" or do "work that involves a high level of concentration," but that she "is able to perform a reduced range of light work"); J.A. 41 (Finding No. 7) (same). (4) "Based on [petitioner's] chronic back pain and diagnoses of degenerative disc disease and possible carpal tunnel syndrome, [the ALJ] f[ou]nd that she would not be able to return to her past relevant work because the exertional demands of the work exceed her present residual functional capacity." J.A. 39; see J.A. 40 (Finding No. 6). (5) However, relying on the hearing testimony of a vocational expert, the ALJ determined that petitioner is capable of performing a number of "light exertional" jobs that exist in the national economy. J.A. 39; see J.A. 41 (Finding No. 10). The ALJ accordingly held that petitioner does not suffer from a "disability" within the meaning of the Social Security Act. J.A. 39; see J.A. 41 (Finding No. 12); J.A. 31.

Along with the ALJ's decision, petitioner and her attorney were provided with a Notice of Decision form that briefly described the Appeals Council process. J.A. 25-28. The Notice of Decision stated: "If you do not agree with [the ALJ's] decision, you may file an appeal

with the Appeals Council." J.A. 25. It explained that the request for review must be made in writing, either through use of SSA's Form HA-520 or by letter. *Ibid.*[11] The Notice of Decision stated that if petitioner requested Appeals Council review, "the Council will consider all of [the ALJ's] decision, even the parts with which [petitioner] may agree." J.A. 26. It also explained that the Appeals Council could review the ALJ's decision even if petitioner did not request review. J.A. 27. The Notice of Decision then stated: "If you do not appeal and the Council does not review [the ALJ's] decision on its own motion, you will not have a right to court review. [The ALJ's] decision will be a final decision that can be changed only under special rules." *Ibid.*[12]

Petitioner then sought review by the Appeals Council. Petitioner's attorney initiated the administrative appeal by submitting to the Appeals Council a letter describing numerous purported flaws in the ALJ's analysis of the evidence and conduct of the

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[11] Form HA-520 is a standardized SSA form that may be used to request Appeals Council review. The current version of Form HA-520 is available at <http://www.ssa.gov/online/ha-520.pdf. SSA regulations provide that a request for Appeals Council review "may be made on Form HA-520 * * * or by any other writing specifically requesting review." 20 C.F.R. 422.205(a). We have lodged a copy of Form HA-520 with the Clerk of this Court.

[12] The Notice of Decision further explained: "You have the right to file a new application at any time, but filing a new application is not the same as appealing this decision. If you disagree with [the ALJ's] decision and you file a new application instead of appealing, you might lose some benefits, or not qualify for any benefits. [The ALJ's] decision could also be used to deny a new application for insurance benefits, if the facts and issues are the same. So, if you disagree with this decision, you should file an appeal within 60 days." J.A. 27-28.

hearing. See J.A. 51-70. The Appeals Council denied the request for review. J.A. 71-73.

3. Petitioner filed suit in federal district court pursuant to 42 U.S.C. 405(g). The case was assigned to a magistrate judge, who prepared a report and recommendation concluding that SSA's ruling should be affirmed and the complaint dismissed with prejudice. J.A. 74-82. The magistrate judge found that the ALJ had properly declined to credit the report of petitioner's psychologist, Dr. Morris, because Dr. Morris's findings were controverted by other evidence. J.A. 77-78. The magistrate judge also rejected petitioner's contentions that the ALJ had selectively ignored evidence bearing on her mental condition (J.A. 78-79); that the ALJ had improperly failed to order a consultative examination under 20 C.F.R. 404.1519 (J.A. 79-80); and that the ALJ had erred by failing to include all of petitioner's impairments in posing a hypothetical question regarding the availability of jobs that petitioner is capable of performing (J.A. 80-81). The district court adopted the report and recommendation of the magistrate judge and entered a final judgment affirming the Commissioner's decision and dismissing the suit. J.A. 83-84.

4. Petitioner appealed, raising three claims of error. First, petitioner contended that the ALJ had given insufficient weight to the medical opinion of Dr. Morris, and had improperly substituted his own views for those of the medical expert with respect to the extent of petitioner's impairments. Pet. C.A. Br. 20-35. Second, petitioner argued that, even accepting the ALJ's own findings as to the severity of petitioner's medical impairments, the ALJ had erred in assessing petitioner's residual functional capacity (RFC)—*i.e.*, in concluding that she was capable of performing "light work." *Id.* at

35-38. Finally, petitioner contended that, in light of the ALJ's findings regarding the severity of petitioner's impairments, the ALJ had violated his duty of full inquiry by failing to order either a psychological or physical consultative examination. *Id.* at 39-43.

The court of appeals affirmed. J.A. 85-86. The court rejected petitioner's contention that the ALJ had failed to accord proper weight to Dr. Morris's opinion. It explained that the claim was "without merit because the ALJ is entitled and expected to determine the credibility of medical experts and to weigh their opinions accordingly." J.A. 86. Relying on *Paul* v. *Shalala*, 29 F.3d 208 (5th Cir. 1994),[13] the court held that it "lack[ed] jurisdiction to review [petitioner's] second and third contentions because they were not raised before the Appeals Council." J.A. 86.

SUMMARY OF ARGUMENT

1. The requirement that a disability claimant seek Appeals Council review before instituting a judicial

[13] The Fifth Circuit in *Paul* held that it "ha[d] jurisdiction to review the [agency's] final decision [in a disability case] only where a claimant has exhausted her administrative remedies." 29 F.3d at 210. The court held that one of the two claims of error raised by the claimant in that case had not been raised before the Appeals Council, and it accordingly declined to consider that claim. *Ibid.* After comparing Paul's brief on appeal with her submission to the Appeals Council, the court held that the claim in question was a "distinct" new argument rather than simply "an expansion of the general rationale proffered in support of the [administrative] appeal." *Ibid.* The Fifth Circuit acknowledged that under some circumstances, "equitable grounds may support this court's decision to consider issues not previously presented." *Ibid.* It found, however, that no such grounds existed in that case, explaining that "Paul's failure to raise her claim during the administrative process was her own doing" and was not caused by any misrepresentation made by the SSA. *Id.* at 211.

action serves the interests of both the Social Security Administration (SSA) and the courts. That exhaustion requirement affords SSA the opportunity to correct its own mistakes, thereby obviating the need for judicial intervention, or to clarify the agency's interpretation of governing statutory and regulatory provisions in a manner that facilitates judicial review. Those policies can be effectively vindicated, however, only if the party that pursues an administrative appeal alerts the agency to the purported flaws in its preliminary resolution of the dispute. The requirement that individual claims of error must be raised before the Appeals Council in order to be cognizable in court is therefore an important corollary to the basic exhaustion requirement. Such a rule significantly facilitates the Appeals Council's performance of its assigned functions, while imposing no meaningful incremental burden on the claimant.

This Court has developed an analogous procedural default rule in the context of federal habeas corpus. A prisoner in state custody has "exhausted" his state remedies if he has pursued all available avenues of state court review (or if the time for doing so has expired), even if he has failed to raise a particular claim at the appropriate time. The Court has recognized, however, that enforcement of procedural default rules, with respect to claims not raised, is essential in order to vindicate the underlying purposes of the statutory exhaustion requirement. The same reasoning applies here.

2. In the instant case, the claims that the court of appeals held to be barred were not raised in *any* administrative forum. Because petitioner's second and third claims of error were premised on the findings made by the ALJ, and were therefore logically unavailable until the ALJ issued his decision, petitioner's

failure to present those arguments to the ALJ does not constitute an independent barrier to their consideration by the courts. But precisely because no SSA official had previously been given an opportunity to consider those claims of error, it was particularly important that the claims be presented to the Appeals Council. On the facts of this case, application of a procedural default rule thus serves to vindicate the basic administrative law principle that an agency's decision is not subject to judicial invalidation on grounds not first presented to the agency.

3. Enforcement of an administrative default rule is fully consistent with the informal and non-adversarial character of SSA's administrative processes for resolving disability claims. Because the Appeals Council functions as an appellate tribunal, it is reasonable to expect that the party who invokes its jurisdiction will perform an appellant's usual role, by identifying the alleged deficiencies in the ALJ's disposition of the case and explaining why the matter warrants further review. Notwithstanding the informal and non-adversarial character of the proceedings, the claimant and her attorney are given both the right and the incentive to perform that role. There is also no basis for petitioner's contention that an administrative default rule would complicate the proceedings by requiring long or hyper-technical filings in support of requests for Appeals Council review. Even a very short and relatively inartful statement of the grounds for review is sufficient, so long as the claimant's filing identifies the purported flaws in the ALJ's disposition of the case, thereby enabling the Appeals Council to focus its attention on those aspects of the ALJ decision with which the claimant disagrees.

4. Petitioner had fair warning that arguments not raised before the Appeals Council would be barred on judicial review. Petitioner was represented by counsel during the Appeals Council proceedings. Her attorney can fairly be charged with knowledge of the fundamental background rule that objections not presented to an administrative agency will be foreclosed in a subsequent judicial proceeding. SSA's regulations and administrative practice do not suggest any exception to that presumptive rule. Petitioner's claim of unfair surprise is particularly unpersuasive in light of the Fifth Circuit's prior decision in *Paul* v. *Shalala*, 29 F.3d 208, 210-211 (1994), which gave petitioner and her attorney unambiguous notice that claims not raised before the Appeals Council would ordinarily be barred from subsequent judicial consideration.

ARGUMENT

THE COURT OF APPEALS PROPERLY DECLINED TO ADDRESS PETITIONER'S SECOND AND THIRD CLAIMS OF ERROR BASED ON PETITIONER'S FAILURE TO PRESENT THOSE CLAIMS TO THE SOCIAL SECURITY ADMINISTRATION'S APPEALS COUNCIL

Judicial review in Social Security cases is governed by 42 U.S.C. 405(g). Section 405(g) provides that "[a]ny individual, after any final decision of the Commissioner of Social Security made after a hearing to which he was a party, may obtain a review of such decision by a civil action" filed in federal district court. Although the Social Security Act requires a "final decision of the Commissioner" as a prerequisite to judicial review, the Act does not specify the point at which the Commissioner's decision becomes "final." As this Court

observed in *Weinberger* v. *Salfi*, 422 U.S. 749, 766 (1975), "[t]he term 'final decision' is not only left undefined by the Act, but its meaning is left to the [Commissioner] to flesh out by regulation."[14]

SSA's regulations make clear that, with exceptions not relevant here (see note 8, *supra*), an applicant for disability benefits must seek review by the Appeals Council in order to obtain a "final decision" of the Commissioner. Thus, 20 C.F.R. 404.900(a)(1)-(4) describes the four levels of administrative review available in such cases: an initial determination by the relevant state agency, a request for reconsideration of that decision, a hearing before the ALJ, and a request for review by the Appeals Council. Section 404.900(a)(5) then states:

> When you have completed the steps of the administrative review process listed in paragraphs (a)(1) through (a)(4) of this section, we will have made our final decision. If you are dissatisfied with our final decision, you may request judicial review by filing an action in a Federal district court.

20 C.F.R. 404.900(a)(5); see also 20 C.F.R. 404.955, 404.981, 422.210(a); *Bowen* v. *Yuckert*, 482 U.S. 137, 142 (1987); *Bowen* v. *City of New York*, 476 U.S. 467, 472,

[14] The Commissioner "is authorized to delegate to any member, officer, or employee of the Social Security Administration designated by the Commissioner any of the powers conferred upon the Commissioner." 42 U.S.C. 405(*l*). As the Court in *Salfi* explained, "Section 405(*l*) accords the [Commissioner] complete authority to delegate his statutory duties to officers and employees of the [SSA]. The statutory scheme is thus one in which the [Commissioner] may specify such requirements for exhaustion as he deems serve his own interests in effective and efficient administration." 422 U.S. at 766.

482 (1986); *Heckler* v. *Ringer*, 466 U.S. 602, 606, 627 (1984). Where (as here) the Appeals Council denies the claimant's request for review, the ALJ's decision becomes the "final decision of the Commissioner" and is subject to judicial review under 42 U.S.C. 405(g). See 20 C.F.R. 422.210(a); pp. 7-8, *supra*.

By seeking Appeals Council review of the ALJ's adverse decision, petitioner satisfied the statutory exhaustion requirement—*i.e.*, she obtained a "final decision of the Commissioner" subject to judicial review under 42 U.S.C. 405(g). Under established principles of administrative law, however, petitioner's second and third claims of error in the Fifth Circuit were barred by her failure to raise those claims during the administrative process. That rule of "administrative default"[15] is fully applicable to Social Security disability appeals.

[15] We use the term "administrative default," in preference to petitioner's term "issue exhaustion," in order to make clear our recognition that petitioner obtained a "final decision of the Commissioner" and therefore did not fail to comply with that statutory exhaustion requirement. Compare *O'Sullivan* v. *Boerckel*, 119 S. Ct. 1728, 1734 (1999) and *id.* at 1736-1737 (Stevens, J., dissenting), discussed at pp. 26-27, *infra*. In *Johnson* v. *Apfel*, 189 F.3d 561 (7th Cir. 1999), the court of appeals misunderstood that terminology. In *Johnson*, as in the instant case, a disability claimant unsuccessfully requested Appeals Council review. The claimant then sought to raise in court a claim that had not been asserted in the administrative appeal. *Id.* at 562. In rejecting the government's contention that the claim was barred, the court of appeals noted that "[t]he government's lawyers * * * are explicit that [Johnson] did *not* fail to exhaust his administrative remedies." *Id.* at 563. The court "t[ook] this to mean * * * that requiring the claimant to brief his issues before the Appeals Council is not important to the agency's mission." *Ibid.* As we explain below, that conclusion does not follow. Although petitioner's default did not, precisely speaking, constitute a failure to exhaust her

A. Where Exhaustion Of An Administrative Appeal Is A Prerequisite To A Judicial Action, The Failure To Raise A Claim In The Administrative Appeal Will Ordinarily Constitute A Procedural Default That Bars Consideration Of The Claim On Judicial Review

1. The purposes that underlie exhaustion requirements strongly suggest that, where pursuit of an administrative appeal is a prerequisite to judicial review, the court should ordinarily entertain only those claims that have been presented to the agency tribunal.[16] As the Court recognized in *McKart* v. *United States*, 395 U.S. 185, 193-195 (1969), consistent enforcement of exhaustion requirements is supported both by respect for agency prerogatives and by concern for judicial efficiency. The Court explained:

> A complaining party may be successful in vindicating his rights in the administrative process. If he is required to pursue his administrative remedies, the courts may never have to intervene. And notions of administrative autonomy require that the agency be given a chance to discover and correct its own errors. Finally, it is possible that frequent and deliberate flouting of administrative processes could weaken the effectiveness of an agency by encouraging people to ignore its procedures.

Id. at 195. Accord, *e.g.*, *Salfi*, 422 U.S. at 765 ("Exhaustion is generally required as a matter of preventing premature interference with agency processes, so that the agency may function efficiently and so that it may have an opportunity to correct its own errors, to afford the parties and the courts the benefit of its experience and expertise, and to compile a record which is adequate for judicial review."); *Heckler* v. *Ringer*, 466 U.S. 602, 619-620 n.12 (1984); *McCarthy* v. *Madigan*, 503 U.S. 140, 144-146 (1992). The Social Security Board identified a number of those advantages when it established the Appeals Council in 1940 and required that a claimant request review by the Appeals Council in order to obtain the agency's final decision. See Monograph of the Attorney General's Committee on Administrative Procedure, S. Doc. No. 10, 77th Cong., 1st Sess., pt. 3 (Appendix) at 39, 51, 53-56 (1941).

Those purposes can be effectively vindicated, however, only if the party who pursues an administrative appeal alerts the agency to the purported flaws in its

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administrative remedies, it nevertheless impaired the Appeals Council's ability to perform its assigned appellate function.

[16] Some statutory review provisions specifically preclude the assertion in court of any objections or issues that have not been raised in the administrative proceedings. See, *e.g.*, 29 U.S.C. 160(e) ("No objection that has not been urged before the [National Labor Relations] Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances."). This Court has treated such express statutory preclusion provisions as going to the "jurisdiction" of the reviewing court. See *Woelke & Romero Framing, Inc.* v. *National Labor Relations Board*, 456 U.S. 645, 666 (1982) ("the Court of Appeals lacks jurisdiction to review objections that were not urged before the Board"). The "common law" administrative default principle applies as an essential corollary to a statutory exhaustion requirement where (as here) the governing law contains no express statutory bar to judicial consideration of issues not raised before the agency. In the latter context, however, the reviewing court has greater latitude to excuse a claimant's default in appropriate cases. See, *e.g.*, *Hormel* v. *Helvering*, 312 U.S. 552, 557 (1941) ("There may always be exceptional cases or particular circumstances which will prompt a reviewing or appellate court, where injustice might otherwise result, to consider questions of law which were neither pressed nor passed upon by the * * * administrative agency below."); note 13, *supra*.

preliminary resolution of the dispute. In the instant case, petitioner argued at length in her administrative appeal to the Appeals Council that the ALJ had improperly rejected the examining physician's assessment of petitioner's medical impairments. See J.A. 51-70. Petitioner did not, however, raise the challenges subsequently advanced in the court of appeals as her second and third claims of error.[17] With respect to

[17] The government's brief in the court of appeals argued that the court should not consider petitioner's second and third claims of error because those claims had not been raised administratively. Gov't C.A. Br. 13-15. With respect to the purported need for a consultative examination (the third claim of error), petitioner did not dispute the government's assertion that the claim had not been presented to the Appeals Council. See Pet. C.A. Reply Br. 5. With respect to the second claim of error, however, petitioner argued that she had

> adequately raised the issue of the Commissioner's assessment of her RFC to the Appeals Council and to the district court. In fact, the *entire basis* of her appeal is that the ALJ failed to adequately evaluate the opinions of her medical providers in formulating her residual functional capacity to work. Even if [petitioner's] counsel did not word the Appeals Council argument as to her RFC in exactly the same manner as in the [court of appeals brief], the substance of the argument is the same.

Id. at 2. In her brief in this Court, petitioner suggests that her second claim of error was raised at least obliquely in the administrative process, and that the Fifth Circuit's dismissal of that claim necessarily reflects a highly technical pleading requirement. See Pet. Br. 4 n.3, 19, 45 n.33.

The question whether petitioner actually raised her second claim of error in the Appeals Council is not fairly included within the question presented in the petition for certiorari. In any event, the court of appeals correctly held that the claim had not been raised in the administrative appeal. The gravamen of the letter submitted to the Appeals Council by petitioner's attorney was that

those claims, petitioner's administrative appeal gave SSA no meaningful "opportunity to correct its own errors" (*Salfi*, 422 U.S. at 765), or to state the agency's views regarding the pertinent aspects of the ALJ's decision. The requirement that individual claims of error must be brought before the Appeals Council in order to be cognizable in court is therefore an important corollary to the requirement that administrative remedies must be exhausted as a prerequisite to judicial review.[18]

the ALJ's findings regarding the severity of petitioner's mental and physical impairments was contrary to the available medical evidence. See J.A. 51-70. Petitioner pursued that argument (as her first claim of error) in the court of appeals, and the court rejected the claim on the merits. See J.A. 86. In the court of appeals, however, petitioner also contended (as her second claim of error) that, *even accepting the ALJ's factual findings as to the scope of her impairments*, there was still no basis for the ALJ's determination that petitioner was capable of performing gainful work. See Pet. C.A. Br. 35-38.

That claim of error is quite different from the arguments made in the Appeals Council. There is consequently no basis for concluding that the Fifth Circuit applied a highly technical standard in determining that her second claim of error had not been raised before the Appeals Council.

[18] Petitioner and her amici contend (Pet. Br. 42 n.31; AARP Br. 8-14) that presentation of particular claims to the Appeals Council will sometimes be futile, since the Appeals Council is required to decide individual cases in conformity with SSA policy. This case does not present the question whether, and under what circumstances, a "futility" exception to the basic administrative default rule might permit a claimant to advance in court an argument that was not presented in her request for Appeals Council review, on the ground that the Appeals Council would have been bound by the Act or governing regulations to reject the argument. See *Mathews* v. *Eldridge*, 424 U.S. 319, 329-330 (1976). Whatever the contours of such an exception, it would not apply here, since the

Indeed, the "administrative default" principle is significantly *less* burdensome than the antecedent requirement that a disability claimant must seek Appeals Council review in order to obtain a "final decision" of the Commissioner. That basic exhaustion requirement benefits both the agency and the court, but it imposes meaningful costs for claimants as well, since it delays the ultimate resolution of those cases in which the Appeals Council denies review.[19] The prospect of such delay has sometimes led this Court to conclude that exhaustion of specific administrative remedies is not an appropriate prerequisite to judicial review. See, *e.g.*, *McCarthy* v. *Madigan*, 503 U.S. at 146 ("In determining whether exhaustion is required, federal courts must balance the interest of the individual in retaining prompt access to a federal judicial forum against countervailing institutional interests favoring exhaustion."); *id.* at 146-147 (citing cases); *Eldridge*, 424 U.S. at 330 ("cases may arise where a claimant's interest in having

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claims that the court of appeals held to be barred indisputably fall well within the Appeals Council's bailiwick. Moreover, there is no reason to suppose that a large percentage of objections that might provide the basis for judicial relief will be beyond the cognizance of the Appeals Council. As SSA has explained, "the vast majority of adverse circuit court decisions do not conflict with [SSA's] interpretation of the Act or regulations; they are based either on the issue of whether substantial evidence supports SSA's final administrative decision or on the issue of whether the final administrative decision adheres to established agency rules." 63 Fed. Reg. 24,930 (1998).

[19] Of course, the availability of an administrative appeal also benefits claimants by affording them an opportunity for relief in a non-adversary setting following an adverse ALJ decision, without the need to file suit in court. The Appeals Council granted some form of relief in 21,959 cases in 1998, a total of over 22% of the 91,173 Appeals Council dispositions. See p. 5 & note 6, *supra*.

a particular issue resolved promptly is so great that deference to the agency's judgment [regarding the need for exhaustion] is inappropriate").

But where (as here) it is undisputed that a party must invoke a particular administrative tribunal before seeking relief in court, the requirement that all objections to the agency's preliminary disposition must be presented to that tribunal imposes no meaningful incremental burden on the claimant. To the contrary, under the Social Security disability programs, such a requirement can be expected to serve the interests of claimants by enhancing the Appeals Council's ability to identify those cases in which relief should be awarded without the need for judicial proceedings.[20] By contrast, a regime in which disability claimants were required to request review by the Appeals Council before pursuing judicial remedies, but were not required to

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[20] By enhancing the Appeals Council's ability to identify meritorious claims, thereby obviating the need for judicial review, administrative default principles serve the interests of the courts as well. The burden on judicial resources imposed by disability litigation under the Social Security Act is very substantial. In fiscal year 1998, 7770 disability insurance cases under Title II of the Act, and 5887 Supplemental Security Income cases under Title XVI, were filed in the federal district courts. See Administrative Office of the United States Courts, *Judicial Business of the United States Courts: Annual Report of the Director* 144 (1998). And insofar as the application of administrative default principles reduces the burden on reviewing courts, it directly furthers the purposes of the underlying exhaustion requirement. See, *e.g.*, *McCarthy* v. *Madigan*, 503 U.S. at 145 ("exhaustion promotes judicial efficiency" because (*inter alia*) "[w]hen an agency has the opportunity to correct its own errors, a judicial controversy may well be mooted"); *McKart*, 395 U.S. at 195 ("A complaining party may be successful in vindicating his rights in the administrative process. If he is required to pursue his administrative remedies, the courts may never have to intervene.").

identify the purported flaws in the ALJ's decisions, would give claimants, SSA, and the courts the worst of both worlds. Compliance with the exhaustion requirement would delay the claimant's access to court, and thus defer the ultimate resolution of the dispute, without providing the agency a fully adequate opportunity either to correct its own mistakes and thereby obviate the need for judicial intervention altogether, or at least to clarify the issues for judicial review and give the reviewing court the benefit of its experience or expertise.

For essentially the same reasons, the fact that SSA has considered eliminating the requirement that claimants seek review in the Appeals Council before proceeding to court (see Pet. Br. 23-24, 35) is irrelevant to the question presented in this case. Reasonable people may disagree as to whether the systemic benefits of Appeals Council review are sufficient to justify the delay and expense that the exhaustion requirement entails. But doubts concerning the wisdom of the underlying exhaustion requirement can provide no justification for the regime that petitioner advocates, in which claimants and the agency must accept the disadvantages that attend the Appeals Council process without the advantages that administrative default rules provide.

Petitioner and her amici also suggest (Pet. Br. 36-37, 40-41; AARP Br. 5-8) that her position is supported by the facts that (a) the resources of the Appeals Council are strained by the enormous volume of cases brought before it, and (b) in a majority of cases the Appeals Council denies review without explanation. Those arguments are without merit. As to the former point: the fact that the Appeals Council's resources are limited simply reinforces the importance of using those

resources wisely by requiring claimants to identify the particular respects in which ALJs are alleged to have erred. As to the latter: the Appeals Council granted some form of relief in almost 22,000 cases in fiscal year 1999, which represented more than 24% of the cases in which it entered dispositions.[21] In any event, whatever relevance those statistics might have to the question whether exhaustion of Appeals Council remedies should be required at all, they provide no justification for the regime that petitioner advocates, under which a claimant would be required to seek Appeals Council review, but would not be required to specify the alleged flaws in the ALJ's decision, in order to file suit in court. See pp. 22-24, *supra*.

2. This Court has developed an analogous procedural default rule in the context of federal habeas corpus. The federal habeas statute provides that a prisoner in state custody may not obtain relief unless he "has exhausted the remedies available in the courts of the State." 28 U.S.C. 2254(b)(1)(A) (Supp. IV 1998). In applying Section 2254(b)(1)(A) (and its predecessors), this Court has recognized that while the question of procedural default is technically distinct from that of exhaustion, the application of procedural bar rules is an essential means of vindicating the purposes that the exhaustion requirement is intended to serve.

A prisoner in state custody has "exhausted" his state remedies if he has invoked every available avenue of

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[21] The Appeals Council received 115,151 requests for review in fiscal year 1999 and acted upon 91,173 requests. See Social Security Administration, Office of Hearings and Appeals, *Key Workload Indicators–Fiscal Year 1999* at 21. It remanded 20,135 of those cases (22% of the 91,173 dispositions) and ordered an award of benefits in 1824 other cases (2.0%). *Ibid.* See also Pet. Br. 37 n.26 (citing comparable statistics for fiscal year 1998).

state court review (or if the time for doing so has expired), even if the prisoner failed to raise a particular claim at the appropriate time. See, *e.g.*, *O'Sullivan* v. *Boerckel*, 119 S. Ct. 1728, 1734 (1999); *id.* at 1736-1737 (Stevens, J., dissenting); *Coleman* v. *Thompson*, 501 U.S. 722, 732 (1991); *Engle* v. *Isaac*, 456 U.S. 107, 125-126 n.28 (1982). This Court has recognized, however, that if federal habeas courts were willing to entertain claims that had not been presented to the state courts,

> a prisoner could evade the exhaustion requirement —and thereby undercut the values that it serves— by "letting the time run" on state remedies. To avoid this result, and thus "protect the integrity" of the federal exhaustion rule, we ask not only whether a prisoner has exhausted his state remedies, but also whether he has *properly* exhausted those remedies, *i.e.*, whether he has fairly presented his claims to the state courts.

O'Sullivan, 119 S. Ct. at 1734 (citations omitted)[22]; see also *Coleman*, 501 U.S. at 731-732 (explaining the connection between exhaustion and procedural default

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[22] In *O'Sullivan*, the state prisoner filed a petition for leave to appeal to the Illinois Supreme Court, raising three challenges to his state conviction. 119 S. Ct. at 1730. The Illinois Supreme Court denied the petition for leave to appeal. *Ibid.* The prisoner then sought federal habeas review. Included in his habeas petition were three claims that might have been, but were not, presented in his request for discretionary review in the state supreme court. *Id.* at 1730-1731. This Court first held that a state prisoner must generally file a petition for discretionary review in the state supreme court in order to satisfy Section 2254(b)(1)(A)'s exhaustion requirement. See 119 S. Ct. at 1731-1734. The Court then held that claims not presented in that petition for discretionary review would be barred from consideration on federal habeas on the ground of procedural default. See *id.* at 1734.

rules). The same reasoning applies here. Although petitioner's request for Appeals Council review technically satisfied the statutory requirement that she obtain a "final decision of the Commissioner" (42 U.S.C. 405(g)) before filing suit, the *purposes* of that requirement would be substantially undermined if petitioner were permitted to raise in court objections to the ALJ's decision that were not presented in her administrative appeal.[23]

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[23] In *Darby* v. *Cisneros*, 509 U.S. 137 (1993), this Court considered the effect of Section 10(c) of the Administrative Procedure Act (APA), 5 U.S.C. 704. The Court held that Section 10(c), by defining the circumstances under which agency action becomes "final" for purposes of judicial review, precludes the courts from imposing additional exhaustion requirements in APA suits. 509 U.S. at 144-147, 153-154. That holding has no direct relevance to this case. Petitioner's suit was brought under 42 U.S.C. 405(g), not under the APA; SSA regulations state unambiguously that a request for Appeals Council review is an essential prerequisite to filing suit in court; and the validity of that exhaustion requirement is established by prior decisions of this Court and is not in dispute here.

Petitioner, however, appears to read *Darby* to stand for a much broader proposition—*i.e.*, that courts lack power under either the APA or the Social Security Act to apply *any* judicially fashioned limitations on the availability or scope of judicial review beyond those expressly stated in the governing statute or applicable regulations. See Pet. Br. 25-27. Petitioner's reliance on *Darby* is misplaced. The Court's analysis in *Darby* rested on the fact that Section 10(c) of the APA directly and comprehensively addresses the specific question of when an appeal to a higher administrative authority is a prerequisite to judicial review. The Court recognized, however, that "federal courts may be free to apply, where appropriate, other prudential doctrines of judicial administration to limit the scope and timing of judicial review." 509 U.S. at 146. The Court's recognition of that authority in APA cases is consistent with the original understanding of the Act. See *Attorney General's Manual on the Administrative Procedure Act* 93 (1947)

B. The Second And Third Claims Of Error That Petitioner Asserted In The Court of Appeals Were Not Raised In Her Request For Review By The Appeals Council And Are Therefore Barred Under Established Principles Of Administrative Law

For the reasons stated above, the purposes of an exhaustion requirement will generally be served only if the appellant is required to present, in his administrative appeal, all claims that he intends to raise in court. A disability claimant's failure to present a claim of error to the Appeals Council therefore should ordinarily bar its consideration in subsequent judicial proceedings.

That rule should apply even in cases where the relevant legal or factual theory was advanced in the proceedings before the ALJ, for in those circumstances the failure to renew the same objection before the Appeals Council would manifest not merely procedural default, but a deliberate abandonment. Here, however, the second and third claims of error that petitioner advanced in the court of appeals were never presented to *any* administrative authority. Because those claims

(observing that Section 10 of the APA "deals largely with principles" and "generally leaves the mechanics of judicial review to be governed by other statutes and by judicial rules' ,. In noting that "the exhaustion doctrine continues to apply as a matter of judicial discretion in cases not governed by the APA," 509 U.S. at 153-154, the *Darby* Court further acknowledged the continuing authority of courts to apply "common law" principles to judicial review of federal agency action, so long as the applicable statutory review provision does not specifically address the relevant question. Because Section 405(g) does not specifically address the authority of a reviewing court to consider objections to an ALJ decision that were not raised before the agency, that question is governed by background principles of administrative law.

were premised on the findings made by the ALJ, and were therefore logically unavailable until the ALJ issued his decision, petitioner's failure to present the arguments to the ALJ does not constitute an independent barrier to their consideration by the courts.[24] But precisely because no SSA adjudicatory official had previously been given an opportunity to consider those claims of error, it was particularly important to the agency's decisionmaking process that the claims be presented to the Appeals Council.

This Court has long recognized, as a fundamental background rule of administrative law, that plaintiffs may not ordinarily obtain judicial review of legal challenges to agency action unless those challenges are first presented to the agency itself. As the Court explained in *United States* v. *L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33 (1952),

> orderly procedure and good administration require that objections to the proceedings of an admini-

[24] Petitioner's second claim of error in the court of appeals was that, even accepting the ALJ's findings as to the severity of her medical impairments, the ALJ had erred in assessing petitioner's RFC. See Pet. C.A. Br. 35-38; note 17, *supra*. By its nature, that claim could not have been raised during the proceedings before the ALJ. Petitioner's third claim of error—*i.e.*, her contention that under the circumstances of this case, the ALJ was required (even in the absence of a request by petitioner) to order a consultative examination before denying benefits—was similarly premised on the ALJ's finding that petitioner suffered from "severe" impairments. See *id.* at 39-43. Thus, petitioner contended in the court of appeals that "the ALJ's own findings that the medical evidence established the presence of specific medical conditions raises the requisite level of suspicion such that the Commissioner is required to order consultative examinations to determine ***the extent of such conditions***." *Id.* at 40-41. That claim likewise could not have been raised during the ALJ proceedings.

> strative agency be made while it has opportunity for correction in order to raise issues reviewable by the courts. * * * Simple fairness to those who are engaged in the tasks of administration, and to litigants, requires as a general rule that courts should not topple over administrative decisions unless the administrative body not only has erred but has erred against objection made at the time appropriate under its practice.

Id. at 37; see also *id.* at 36 & n.5 (citing earlier cases).[25] Accord, *e.g.*, *Unemployment Compensation Comm'n* v. *Aragon*, 329 U.S. 143, 155 (1946) ("A reviewing court usurps the agency's function when it sets aside the administrative determination upon a ground not theretofore presented and deprives the [agency] of an opportunity to consider the matter, make its ruling, and state the reasons for its action.").[26]

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[25] Correspondingly, a reviewing court may not *affirm* an agency's decision on a ground that the *agency* did not invoke in the administrative proceedings. See *SEC* v. *Chenery Corp.*, 318 U.S. 80, 88 (1943).

[26] In a variety of circumstances, the courts of appeals have recognized the general rule that a plaintiff may not object in court to administrative action on grounds not first presented to the agency. See, *e.g.*, *Omnipoint Corp.* v. *FCC*, 78 F.3d 620, 635 (D.C. Cir. 1996); *Salt Lake Community Action Program, Inc.* v. *Shalala*, 11 F.3d 1084, 1087 (D.C. Cir. 1993); *Colin K. by John K.* v. *Schmidt*, 715 F.2d 1, 5-6 (1st Cir. 1983); *Railway Labor Executives' Ass'n* v. *United States*, 791 F.2d 994, 1000 (2d Cir. 1986); *Director, OWCP* v. *North American Coal Corp.*, 626 F.2d 1137, 1143 (3d Cir. 1980); *Rana* v. *United States*, 812 F.2d 887, 890 (4th Cir. 1987); *Brotherhood of Railway, Airline, and Steamship Clerks* v. *St. Louis Southwestern Railway*, 676 F.2d 132, 136-139 (5th Cir. 1982); *Hix* v. *Director, OWCP*, 824 F.2d 526, 527 (6th Cir. 1987); *Myron* v. *Chicoine*, 678 F.2d 727, 731-732 (7th Cir. 1982); *Edwards* v. *Department of the Army*, 708 F.2d 1344, 1346-1347 (8th Cir. 1983); *Sears, Roebuck & Co.* v. *FTC*, 676 F.2d 385, 398 (9th Cir. 1982); *Rives* v. *I.C.C.*, 934 F.2d 1171, 1176 (10th Cir. 1991), cert. denied, 503 U.S. 959 (1992); *State of Alabama ex rel. Siegelman* v. *U.S.E.P.A.*, 911 F.2d 499, 505-506 (11th Cir. 1990).

As *Tucker Truck Lines* makes clear, the rule that objections not presented to an administrative agency will thereafter be deemed waived applies even where the plaintiff has invoked every available layer of administrative review. The plaintiff in *Tucker Truck Lines* was aggrieved by the decision of an Interstate Commerce Commission hearing examiner. 344 U.S. at 34. The plaintiff filed exceptions to the examiner's decision; subsequently requested reconsideration by the full Commission; and later petitioned the Commission for "extraordinary relief." *Ibid.* Nothing in the Court's opinion suggests that any additional level of administrative review remained available. Rather, the defect in the plaintiff's lawsuit was that the particular objection asserted in court—*i.e.*, the contention that the hearing examiner had been appointed in an invalid manner—had not been raised during the administrative process.

Under petitioner's approach, however, unsuccessful applicants for disability benefits under the Social Security Act could routinely obtain judicial review of legal and factual issues that *no* SSA official had been given the opportunity to consider. To permit judicial review of those claims would subvert the Appeals Council's performance of its assigned function and would contravene established principles of administrative law.

C. Administrative Default Principles Are Fully Applicable To The Appeals Council Process

Petitioner appears to accept the general proposition that claims not pursued in a mandatory administrative appeal cannot thereafter be asserted in court. She contends, however, that application of administrative default principles in the present context would be inappropriate because SSA's administrative processes for resolving disability claims are informal and non-adversarial. That argument is incorrect.

1. This Court has recognized that the requirement of Appeals Council review in Social Security cases serves essentially the same purposes as exhaustion requirements generally. Thus, the Court in *Salfi* cited *McKart* and described the justifications for Section 405(g)'s exhaustion requirement in terms that tracked *McKart*'s general discussion of exhaustion principles. See 422 U.S. at 765; see also *Ringer*, 466 U.S. at 619-620 n.12; page 19, *supra*. In *City of New York*, the Court excused the failure of many members of the class of disability claimants to exhaust their administrative remedies on the ground that

> [t]his case is materially distinguishable from one in which a claimant sues in district court, alleging mere deviation from the applicable regulations in his particular administrative proceeding. *In the normal course, such individual errors are fully correctable upon subsequent administrative review since the claimant on appeal will alert the agency to the alleged deviation.* Because of the agency's expertise in administering its own regulations, the agency ordinarily should be given the opportunity to review

> application of those regulations to a particular factual context.

476 U.S. at 484-485 (emphasis added).[27] As the italicized language makes clear, the guiding assumption in the context of Social Security disability claims, as in other administrative settings, is that the claimant in exhausting his administrative remedies will identify the purported flaws in the agency decision that is the subject of higher-level administrative review.

In *Richardson* v. *Perales*, 402 U.S. 389 (1971), this Court recognized that the informal nature of SSA disability proceedings does not relieve a represented claimant of responsibility for protecting his interests during the administrative process. The Court in *Perales* noted that "strict rules of evidence, applicable in the courtroom, are not to operate at social security hearings so as to bar the admission of evidence otherwise pertinent." *Id.* at 400. The Court accordingly held that the written report of an examining physician could provide a sufficient evidentiary basis to support a hearing examiner's denial of benefits. *Id.* at 402. The Court observed, *inter alia*, that

> [a]lthough the claimant complains of the lack of opportunity to cross-examine the reporting physicians, he did not take advantage of the opportunity afforded him under [the regulations] to request

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[27] In *City of New York*, the Court found that the plaintiffs' failure to exhaust administrative remedies should be excused based on the district court's finding of "a systemwide, unrevealed policy that was inconsistent in critically important ways with established regulations." 476 U.S. at 485. The Court concluded that "[u]nder these unique circumstances, there was nothing to be gained from permitting the compilation of a detailed factual record, or from agency expertise." *Ibid.*

> subpoenas for the physicians. * * * This inaction on the claimant's part supports the Court of Appeals' view that the claimant as a consequence is to be precluded from now complaining that he was denied the rights of confrontation and cross-examination.

Id. at 404-405 (citation omitted). *Perales* makes clear that, at least where a disability claimant is represented by counsel (see *id.* at 395-396), he may be foreclosed from raising particular objections to the conduct of the administrative process if he fails to assert his rights in a timely fashion.

2. The Appeals Council is an *appellate* body exercising discretionary jurisdiction.[28] SSA regulations make clear that the Appeals Council will not ordinarily grant review simply to reconsider the ALJ's assessment of the relevant evidence. Rather, Appeals Council review is appropriate where (1) "[t]here appears to be an abuse of discretion by the [ALJ]"; (2) "[t]here is an error of law"; (3) "[t]he action, findings or conclusions of the [ALJ] are not supported by substantial evidence"; or (4) "[t]here is a broad policy or procedural issue that

[28] In that sense the relationship between the Appeals Council and the ALJ is fundamentally different from the relationship between the ALJ and the state agency that makes the initial determination of disability. An individual claimant must apply for benefits with the state agency, and seek reconsideration if the initial application is denied, as a prerequisite to a hearing before the ALJ. But once that prerequisite has been satisfied, the ALJ proceeding involves a de novo determination of the claimant's eligibility for benefits, not an appellate review of the state agency's determination. See *Heckler* v. *Day*, 467 U.S. 104, 107 (1984).

> may affect the general public interest." 20 C.F.R. 404.970(a)(1)-(4).[29]

The Seventh Circuit, in its recent decision holding that a claimant's failure to raise a particular issue before the Appeals Council did not bar him from asserting the claim on judicial review, stated: "Basically all that seems contemplated or required [by SSA regulations] is that the disappointed claimant ask the Appeals Council to take a look at what the administrative law judge has done and reverse if it finds an error. The Appeals Council operates more like a complaint bureau than an appellate court." *Johnson* v. *Apfel*, 189 F.3d 561, 563 (7th Cir. 1999). As the preceding discussion makes clear, that statement reflects a fundamental misconception of the regulatory framework and of the Appeals Council's place in the administrative scheme. The pertinent SSA regulations make clear that the Appeals Council functions as an appellate tribunal, whose ordinary practice is to exercise jurisdiction only in defined categories of cases. It is consequently reasonable to expect that a claimant who invokes the Appeals Council's jurisdiction will perform an appellant's usual role—*i.e.*, to identify the alleged deficiencies in the ALJ's disposition of the case, and to explain why the

[29] Pursuant to 20 C.F.R. 404.970(b), a claimant who is denied benefits by the ALJ may submit "new and material" evidence to the Appeals Council, so long as that evidence "relates to the period on or before the date of the [ALJ] hearing decision." Under that provision, it is possible for the Appeals Council to overturn an ALJ's ruling based on evidence that was not before the ALJ. Even under Section 404.970(b), however, the Appeals Council does not ordinarily undertake a de novo assessment of eligibility for benefits. Rather, it reviews the case "if it finds that the [ALJ's] action, findings, or conclusion is contrary to the weight of the evidence currently of record." 20 C.F.R. 404.970(b).

case satisfies the Appeals Council's standards for exercising discretionary review.[30]

Indeed, the majority of the courts of appeals to consider the question have held that administrative default principles apply in this setting and typically bar a claimant from asserting in court objections not presented to the agency. See *Meanel* v. *Apfel*, 172 F.3d 1111, 1115 (9th Cir. 1999) ("at least when claimants are represented by counsel, they must raise all issues and evidence at their administrative hearings in order to preserve them on appeal"); *James* v. *Chater*, 96 F.3d 1341, 1343-1344 (10th Cir. 1996) ("[a] request for administrative review, which does not identify the issues with any particularity, effectively sandbags the Appeals Council"); *Harper* v. *Secretary of Health & Human Services*, 978 F.2d 260, 265 (6th Cir. 1992) ("Because the record does not indicate that the issue was raised at the administrative level, we are not in a position to consider the issue"); *Paul* v. *Shalala*, 29 F.3d 208, 210 (5th Cir. 1994) ("Paul's failure to raise her

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[30] The courts of appeals have consistently held that the Appeals Council may review a case on its own motion pursuant to 20 C.F.R. 404.969, whether or not the case falls within one of the categories described in 20 C.F.R. 404.970. See, *e.g.*, *Welch* v. *Heckler*, 808 F.2d 264, 267-268 (3d Cir. 1986); *Bauzo* v. *Bowen*, 803 F.2d 917, 920-922 (7th Cir. 1986); *Mullen* v. *Bowen*, 800 F.2d 535, 542-545 (6th Cir. 1986) (en banc); *Fierro* v. *Bowen*, 798 F.2d 1351, 1353-1354 (10th Cir. 1986), cert. denied, 480 U.S. 945 (1987); *Parker* v. *Bowen*, 788 F.2d 1512, 1518-1519 (11th Cir. 1986) (en banc). Section 404.970 is therefore properly regarded not as a binding constraint on the Appeals Council's discretion to grant review in particular cases, but as a statement regarding the manner in which that discretion will generally be exercised. Cf. Sup. Ct. R. 10. It is nevertheless entirely reasonable to expect that a claimant who invokes the Appeals Council's jurisdiction will at least briefly explain why the case is appropriate for Appeals Council review.

* * * claim in the Appeals Council * * * deprives us of jurisdiction to review the claim"). Prior to its decision in *Johnson*, the Seventh Circuit had applied that rule as well. See *Johnson*, 189 F.3d at 562-563 (citing cases). The Eighth Circuit is the only other court of appeals to have held that a disability claimant may challenge the Commissioner's adverse decision on grounds not raised before the Appeals Council. See *Harwood* v. *Apfel*, 186 F.3d 1039, 1042-1043 (8th Cir. 1999).

3. The informal and non-adversarial character of the Appeals Council proceedings (see 20 C.F.R. 404.900(b)) does not alter the foregoing analysis. Appeals Council proceedings are informal in the sense that technical rules of pleading, document preparation, and evidence do not apply. See 20 C.F.R. 422.205(a) (request for Appeals Council review may be made on a form provided by SSA "or by any other writing specifically requesting review"); cf. *Perales*, 402 U.S. at 400-401. They are non-adversarial in the sense that the disability claimant is not opposed by any advocate charged with defending the ALJ ruling. In those respects the Appeals Council proceedings differ from any subsequent litigation in the federal courts concerning SSA's benefits determinations, which will be governed by the Federal Rules of Civil (or Appellate) Procedure, and in which government counsel will appear to defend the Commissioner's "final decision."

The informal and non-adversarial character of the Appeals Council process, however, does not meaningfully affect the relationship between the claimant and the Appeals Council. As with an appellant in civil litigation or in an "adversarial" administrative appeal, the claimant's objective is to attempt to persuade the appellate body that the trial-level decisionmaker has

erred and that the error warrants appellate correction. In pursuing that objective, the claimant is free to submit "[a]ny documents or other evidence [she] wish[es] to have considered * * * with [her] request for review." 20 C.F.R. 404.968(a). The essential first step in that process is for the claimant to identify, with at least some degree of specificity, the particular respects in which she believes that the ALJ has erred. The fact that no particular form of documentation is required, and that no agency counsel is assigned to oppose the claimant's submission or to defend the ALJ's ruling, cannot reasonably be supposed to render that step superfluous.

Nor does the informal and non-adversarial character of the proceedings alter the role of the claimant's attorney. The claimant's lawyer does not owe primary loyalty to the government, and his role before the Appeals Council is not to assist SSA in arriving at the most accurate possible benefits determination. It is instead to serve as an advocate for the claimant's interests, and to represent those interests as vigorously as possible consistent with applicable norms of ethical practice. The absence of any *opposing* counsel at that stage of the administrative process does not lessen that duty of vigorous advocacy. Just as with any other appellate agency tribunal, the requirement that a disability claimant seek Appeals Council review before filing suit in court therefore carries with it the requirement that a claimant must alert the agency to the purported flaws in the ALJ's decision during the course of the administrative process in order to preserve those claims for judicial review.

The fact that the Appeals Council may choose *sua sponte* to address issues not raised by the claimant does not alter the foregoing analysis. The prudential re-

quirement that a litigant must have raised a matter before the Appeals Council in order to raise it in court is similar to this Court's general practice of declining to review a claim that was "neither raised before nor considered by" the lower court. *Adickes* v. *Kress & Co.*, 398 U.S. 144, 147 n.2 (1970). Where a lower court actually addresses a question not raised by the parties, its resolution of the issue is subject to this Court's review. See, *e.g.*, *Virginia Bankshares, Inc.* v. *Sandberg*, 501 U.S. 1083, 1099 n.8 (1991). But the fact that a lower court has discretion to decide such questions, cf. *Kolstad* v. *American Dental Ass'n*, 119 S. Ct. 2118, 2127 (1999) ("The Court has not always confined itself to the set of issues addressed by the parties."), does not vitiate the application of waiver rules in a case where the lower court declines to exercise that discretion. The same principle applies here. If the Appeals Council grants review in a particular case and addresses a question not raised by the claimant, its resolution of the issue is reviewable in court. But where (as here) the Appeals Council denies review, issues not raised in the request for review will ordinarily be deemed to be defaulted, notwithstanding the fact that the Appeals Council *might* have chosen to resolve questions not pressed before it.[31]

4. Petitioner also contends (Br. 14) that the administrative default rule applied by the Fifth Circuit in this case will "add procedural complexity and formality to the SSA adjudicative process," in derogation of con-

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[31] Similarly, the Appeals Council may (and occasionally does) review an ALJ decision even though the claimant has not filed a request for review. See 20 C.F.R. 404.969. But if the Appeals Council does not choose to review a particular case *sua sponte*, the claimant's failure to file a request for Appeals Council review will bar any effort to obtain relief in court.

gressional intent. In a similar vein, the Seventh Circuit suggested that application of administrative default principles in this setting would "compel disappointed applicants for disability benefits to bombard the Appeals Council with full briefs in order to preserve their right to judicial review." *Johnson*, 189 F.3d at 563. That fear is groundless. Even a very short and relatively inartful statement of the grounds for review is sufficient, so long as the claimant's filing identifies the purported flaws in the ALJ's disposition of the case, thereby enabling the Appeals Council to focus its attention on those aspects of the ALJ decision with which the claimant disagrees. Application of the standard procedural default rule in this setting does not require that claims be presented in a legally sophisticated manner, or otherwise disturb the relatively informal character of the Appeals Council proceedings.

The *Johnson* court was wrong in any event to substitute its views for those of the agency regarding the manner in which SSA's administrative process can most efficiently be implemented. SSA's invocation of administrative default principles in courts around the country (see pp. 36-37, *supra*) reflects the agency's view that, with respect to claimants who are represented during Appeals Council proceedings, such rules are consistent with the informal and non-adversarial character of the administrative process.[32] SSA's views regarding the essential character and adjudicatory requirements of a body that the agency itself has created are entitled to substantial respect from a reviewing court. Cf. *Auer* v. *Robbins*, 519 U.S. 452, 462

[32] See also note 35, *infra* (describing SSA's plans to revise forms given to claimants' representatives to inform them of administrative default rule).

(1997) (a reviewing court should defer to an agency's interpretation of its own regulation, even where that "interpretation comes to [the court] in the form of a legal brief," so long as the brief "reflect[s] the agency's fair and considered judgment on the matter in question").[33]

D. Petitioner Had Fair Warning That Arguments Not Raised Before The Appeals Council Would Be Barred On Judicial Review

Petitioner contends (see Br. 42-49) that SSA has engaged in "misleading and deceptive conduct" regarding the consequences of a claimant's failure to raise particular claims before the Appeals Council. She argues that SSA's failure to provide adequate notice precludes application of administrative default principles. That argument is without merit.

1. In determining the adequacy of notice in this setting, the question is whether a *represented* claimant may reasonably be charged with knowledge that the failure to raise an argument before the Appeals Council will effect a waiver of that argument in a subsequent judicial proceeding. Petitioner was represented by counsel both before the ALJ and before the Appeals Council. Assuming that application of an administrative default rule to her own lawsuit is fair and equitable, she cannot escape the consequences of her default by arguing that such a rule would be unfair as applied to *unrepresented* claimants. Moreover, as a

[33] As we explain above (see note 15, *supra*), the Seventh Circuit's error appears to have resulted in part from the court's misunderstanding of the government's acknowledgment that a failure to raise particular arguments before the Appeals Council is not, strictly speaking, a failure to "exhaust."

policy, the government has not invoked administrative default in suits brought by claimants who were unrepresented during the Appeals Council proceedings. See Supp. Pet. App. C2; Gov't Br. in Opp. 9. The Court's inquiry should accordingly focus on whether petitioner's attorney had adequate notice that the failure to raise particular claims before the Appeals Council would bar their subsequent assertion in court.[34]

2. Petitioner contends (Br. 44) that SSA has misled claimants "by advertising an informal, non-adversarial Appeals Council process, by encouraging claimants to present their issues in a three-line space, and by failing to provide an issue waiver warning along with the other appellate review warnings in the notice of unfavorable ALJ decision." To take the last point first: As we explain above, the rule that objections not presented to an administrative agency will thereafter be deemed waived is a firmly established background principle of administrative law. The essential attribute of a background rule is that it is assumed to apply absent some clear indication to the contrary. The agency's "fail[ure] to provide an issue waiver warning" (Pet. Br. 44) therefore could not reasonably have led petitioner's counsel to conclude that issues not preserved before the Appeals Council could thereafter be pressed in court.[35]

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[34] Petitioner is accountable for her attorney's acts and omissions. See, *e.g.*, *Pioneer Inv. Servs. Co.* v. *Brunswick Assocs. Ltd. Partnership*, 507 U.S. 380, 396-397 (1993). Cf. *New York* v. *Hill*, 120 S. Ct. 659, 664 (2000) ("decisions by counsel are generally given effect as to what arguments to pursue"); *Irwin* v. *Department of Veterans Affairs*, 498 U.S. 89, 92-93 (1990) (attorney's knowledge of agency action commencing 30-day period for filing suit is properly attributed to client).

[35] The ALJ's Notice of Decision expressly informed petitioner that "[i]f you do not appeal and the [Appeals] Council does not review [the ALJ's] decision on its own motion, you will not have a right to court review." J.A. 27. As the Court explained in *Salfi*, Congress has authorized SSA to decide what avenues of administrative review must be exhausted in order to obtain a "final decision of the Commissioner" subject to judicial review under 42 U.S.C. 405(g). See *Salfi*, 422 U.S. at 766 ("The term 'final decision' is not only left undefined by the Act, but its meaning is left to the [Commissioner] to flesh out by regulation."). Because the requirement that disability claimants seek Appeals Council review before pursuing judicial remedies is the direct result of an SSA-specific regulation, it is particularly appropriate for SSA to give claimants express notice of that requirement. By contrast, the administrative default rule that we advocate here is not specific to the SSA; it simply reflects the application to disability cases of general principles of administrative law. The absence of explicit, individualized notice of that background rule cannot reasonably be taken to suggest that the normal rule would not apply.

As we explained in our brief at the petition stage (see Gov't Br. in Opp. 11-12), SSA has informed us that it intends to amend the form that claimants and their representatives must file in order for the agency to recognize someone other than the claimant as acting on the claimant's behalf in matters before the agency. The revised form will advise the claimant's representative that the failure to present an issue to the Appeals Council may preclude the claimant from raising the issue upon judicial review of the agency's decision. Contrary to petitioner's assertion (Br. 47-48), however, the agency's decision to amend the form does not suggest that the relevant principles of administrative law were previously inaccessible to claimants and their counsel.

Rather, the question is whether counsel could reasonably have construed SSA regulations and agency practice as affirmatively recognizing an exception to the presumptive rule of administrative law.

For the reasons stated at pages 37-40, *supra*, neither the informality nor the non-adversarial character of Appeals Council proceedings is in any way inconsistent with principles of administrative default. The SSA regulations do not prevent or discourage the claimant

and her attorney from making a forceful challenge to the adverse decision of the ALJ. To the contrary, the regulations specifically provide that the claimant is free to submit "[a]ny documents or other evidence [she] wish[es] to have considered * * * with [her] request for review." 20 C.F.R. 404.968(a). The regulations specify the criteria ordinarily applied by the Appeals Council in determining whether to grant review, see 20 C.F.R. 404.970, and the notice of the ALJ's decision sent to petitioner and her attorney stated that "[t]he Council will review your case if one of the reasons for review listed in our regulations exists." J.A. 26-27. An awareness of the informal, non-adversarial character of the Appeals Council process therefore could not reasonably cause the claimant or her attorney to believe that ordinary rules of administrative default are inapplicable in this setting.

There is also no basis for petitioner's suggestion (Br. 43) that the three lines provided on Form HA-520 (see note 11, *supra*) for stating objections to the ALJ's decision misled her into believing that particular challenges need not be raised before the Appeals Council in order to be preserved for judicial review. In the first place, Form HA-520 is not the exclusive means of requesting Appeals Council review. SSA regulations provide that a request for Appeals Council review "may be made on Form HA-520 * * * or by any other writing specifically requesting review." 20 C.F.R. 422.205(a); see also 20 C.F.R. 404.968(a) ("You may request Appeals Council review by filing a written request."). The ALJ's Notice of Decision in this case similarly made clear that petitioner could request Appeals Council review either by using Form HA-520 or by "writ[ing] a letter." J.A. 25. Since petitioner's counsel did not submit a Form HA-520, but instead

invoked the Appeals Council's jurisdiction by means of a lengthy and detailed letter (see J.A. 51-70), there is no reason to believe that counsel was in any way misled by the contents of that Form.

In any event, Form HA-520 itself requires the claimant to identify the grounds for his challenge to the ALJ decision. The Form states: "I request that the Appeals Council review the Administrative Law Judge's action on the above claim because:" (item 5). The fact that only three lines are provided for the claimant's response indicates that a very brief explanation of the grounds for appeal may suffice and, in any event, a claimant could attach an additional sheet if she believed that was necessary. The Form does not suggest, however, that Appeals Council proceedings are an exception to the generally applicable requirement that one who invokes the jurisdiction of an appellate tribunal should identify the alleged error(s) in the decision from which the appeal is taken.

3. Petitioner's claim of unfair surprise is particularly unpersuasive in light of the Fifth Circuit's prior decision in *Paul* v. *Shalala*, 29 F.3d 208 (1994). The court issued its decision in *Paul* more than 19 months before petitioner filed her request for review in the Appeals Council. See *ibid.*; J.A. 51. That decision gave petitioner and her attorney unambiguous notice that, at least within the Fifth Circuit, claims not raised before the Appeals Council would ordinarily be barred from subsequent judicial consideration. See 29 F.3d at 210-211. Thus, any uncertainty that might otherwise have existed regarding the applicability of administrative default principles in this setting was dispelled by the ruling in *Paul*.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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In The

Supreme Court of the United States

JUATASSA SIMS,

Petitioner,

vs.

KENNETH S. APFEL,
Commissioner of Social Security,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

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SUMMARY OF THE ARGUMENT

Because the Commissioner of Social Security ("Commissioner") has conceded that the application of issue exhaustion[1] is not jurisdictionally required and is not specifically required by applicable statutes or regulations, the remaining issues before the Court are whether issue exhaustion is inconsistent with governing regulations and core relevant provisions underlying the Social Security Act ("Act"), whether prudential considerations favor the application of common law issue exhaustion principles to Social Security cases, and whether due process considerations preclude the application of issue exhaustion in the current regulatory and statutory scheme.[2] Contrary to the position of the Commissioner, as applied to Social Security proceedings, issue exhaustion is not only inconsistent with the current regulatory and statutory scheme, but it is likewise misapplied as a judicially created prudential principle.

The Commissioner's reliance on habeas corpus cases, cases involving issue waiver between the district and circuit courts, cases involving other regulatory agency

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[1] The Commissioner's suggestion that the term "administrative default" is preferable to the term "issue exhaustion" should be rejected. Resp't. Br. at 17, n.15. The use of the term "administrative default" assumes that Social Security claimants have somehow defaulted on a duty or requirement to raise all issues administratively. The term "procedural default" (similar to the Commissioner's suggestion of the term "administrative default") is used in criminal habeas corpus cases and refers to a state prisoner's failure to comply with a state's ***statutory*** procedural requirements. *See Coleman v. Thompson,* 501 U.S. 722, 729 (1991). There are no statutes or regulations at issue in this case that require issue exhaustion.

[2] The Commissioner admits that issue exhaustion as applied in the Social Security context does not involve "a matter of appellate jurisdiction in the technical sense." *See* Opp'n Cert. at 5, n.3 and 7. Nor does the Commissioner cite to any regulations or statutes that require issue exhaustion.

proceedings, and decisions of this Court interpreting the Social Security Act ("Act") is misplaced. Social Security proceedings are fundamentally different from those of other agencies by virtue of their non-adversarial, informal, inquisitorial basis. Prudential considerations and applicable exceptions do not support the application of issue exhaustion. Moreover, the Commissioner has not provided this Court with any explanation of why, to date, it has not simply promulgated such a regulation if, indeed, it is consistent with applicable statutes and regulations.

ARGUMENT

I. THE COMMISSIONER FAILED TO REFUTE THAT THE APPLICATION OF ISSUE EXHAUSTION PRINCIPLES TO SOCIAL SECURITY PROCEEDINGS IS INCONSISTENT WITH GOVERNING SOCIAL SECURITY REGULATIONS AND THE CORE PURPOSES UNDERLYING THE ACT.

The Commissioner argues that general exhaustion principles should apply despite the absence of specific authority in the regulations or the statutes. *See* Resp't. Br. at 18-28. However, the Commissioner's regulations and the accompanying statutory scheme are inconsistent with the imposition of an exhaustion requirement. *See* Pet'r Br. at 12-23.

As set forth in 20 C.F.R. § 404.900 (1999),[3] the administrative review process consists of several steps, which must be requested within certain time periods and in a certain order. *Id.* There is no requirement that a claimant raise any issue to preserve the issue for later judicial review.[4] On the other hand, the regulations specifically

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[3] All further references to the 1999 edition of the *Code of Federal Regulations* will be omitted.

[4] As Chief Judge Posner noted, "all that is required [to request review from the Appeals Council] is completion of a one-page form (Form HA-520) that provides only a space of three lines (roughly two inches in total) for the statement of the issues and grounds, for appeal." *See Johnson v. Apfel*, 189 F.3d 561, 563 (7th Cir. 1999); *Harwood v. Apfel*, 186 F.3d 1039, 1042-43 (8th Cir. 1999). The regulations also contain a section that is entitled "How to Request Appeals Council Review," 20 C.F.R. § 404.968, that provides that a claimant may request Appeals Council review by filing a written request.

require the Appeals Council to review a case if: (1) there appears to be an abuse of discretion by the administrative law judge; (2) there is an error of law; (3) the action, findings or conclusions of the administrative law judge are not supported by substantial evidence; or (4) there is a broad policy or procedural issue that may affect the general public interest. 20 C.F.R. § 404.970.[5] This mandatory duty, imposed by regulation, exists *regardless of whether a claimant raises any or all issues to the Appeals Council.* If the Appeals Council denies a request for review, the Appeals Council tacitly acknowledges that it has fully examined the ALJ's decision.[6]

The Commissioner incorrectly argues that under subsection 404.970(a), the Appeals Council has the "discretion," but not the obligation, to grant a request for review if the Appeals Council identifies an error that a claimant

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[5] The full text of 20 C.F.R. § 404.970 is contained in the Appendix attached hereto.

[6] Indeed, the standard language appended to ALJ decisions advises claimants that on appeal, the Appeals Council "will consider all of my decision, even the parts with which you may agree." J.A. at 26. The notice accompanying the decision affirmatively provides that the Appeals Council *will* (not "may") review the case if any of the reasons listed in the regulations exist. *Id.* The wording also provides that "*requesting review places the entire record of your case before the Appeals Council.*" *Id.* (Emphasis added). Boilerplate Appeals Council denial of review letters, such as in Ms. Sims' case, also affirmatively represent that the Appeals Council will examine each case according to 20 C.F.R. § 404.970. J.A. at 71.

did not specifically raise to the Appeals Council. Resp't Br. at 30. He essentially argues that the word "will" contained in § 404.970(a) should be interpreted as "may" or "will only if identified by a claimant." *Black's Law Dictionary* (6th Ed. 1991) defines the verb "will" as:

> An auxiliary verb commonly having the mandatory sense of 'shall' or 'must.' It is a word of certainty, while the word 'may' is one of speculation and uncertainty.

Id. at 1598. The Commissioner's interpretation should be rejected as contrary to the plain language of the regulations and statutes and to the instructions and information provided to claimants in the ALJ and Appeals Council decisions.[7]

The Commissioner has the authority under relevant statutes to amend the foregoing regulation to lessen the Appeals Council's current obligation under Section 404.970. He has not done so, suggesting that the plain language is adequate. *See Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204 (1988) (holding that no deference is owed convenient agency litigation positions unsupported by regulations, rulings or agency practice).[8] Moreover, as Justice Scalia recently stated for a majority of this Court: "it is hard to imagine a more violent breach of [the requirement of reasoned decision-making] than applying a rule of primary conduct . . . which is in fact different from the rule or standard formally announced [by an agency]." *Allentown Mack v. NLRB*, 522 U.S. 359, 373-75

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[7] Contrary to the Commissioner's assertions, Section 404.969 (specifically permitting the Appeals Council to conduct own motion reviews) does not limit the plain meaning of Section 404.970. *See* Resp't Br. at 36, n.30. Rather, Section 404.970(a) merely sets out those categories of cases which the Appeals Council "will" review. *See Mullen v. Bowen*, 800 F.2d 535 (6th Cir. 1986).

[8] *See also Daniels v. Apfel*, 154 F.3d 1129, 1134 (10th Cir. 1998) (stating that the Commissioner could not interpret a regulation on appeal contrary to its plain language).

(1998). *See also id.* (decrying the "evil" of an agency's application of a "standard other than the one it enunciates").

To date, the Commissioner has elected not to promulgate an issue exhaustion regulation. In his 46-page brief, the Commissioner provides *no explanation* why he has not simply promulgated such a regulation. Indeed, in the Commissioner's Brief in Opposition filed in October 1999, the Office of Solicitor General even acknowledged that the "question presented in this case can be conclusively resolved by regulation." Opp'n Cert at 13.

The Commissioner improperly seeks to have the judiciary craft rules that are inconsistent with the present statutory and regulatory scheme, and in so doing, circumvent the Administrative Procedure Act's rule-making process and principles of public involvement and agency accountability protected thereunder. The Commissioner also seeks control over when he will invoke the doctrine of issue exhaustion, as evidenced by his apparent intent to amend the form appointing a representative. *See* Resp't Br. at 43, n.35. However, it is more appropriate for the Commissioner to promulgate his own regulation that properly considers competing congressional policies and long-term agency practices than for this Court to craft a rule whose application is subject to the whims of agency counsel on a case-by-case basis.

II. THE COMMISSIONER FAILED TO PROVIDE ADEQUATE JUSTIFICATION FOR THE APPLICATION OF PRUDENTIAL JUDICIALLY-IMPOSED ISSUE EXHAUSTION PRINCIPLES TO SOCIAL SECURITY CASES.

The Commissioner failed to provide adequate justification for the application of a judicially-imposed issue exhaustion requirement. Courts have identified four specific goals supportive of administrative issue exhaustion and have developed a number of prudential exceptions that excuse the application of issue exhaustion. *See*

Pet'r Br. at 28-41. The Commissioner argues that although there is no statutory or regulatory authority in favor of applying issue exhaustion in Social Security cases, federal courts should apply common law issue exhaustion principles to Social Security cases. He also incorrectly asserts that "the majority of courts of appeals to consider the question have held that administrative default principles apply in this setting and typically bar a claimant from asserting in court objections not presented to the agency." Resp't Br. at 36. Indeed, the current state of circuit court jurisprudence on issue exhaustion as applied to Social Security proceedings does not support the Commissioner's assertion.[9]

The Commissioner cites four categories of cases in support of the application of issue exhaustion principles in Social Security cases: (1) criminal habeas corpus cases; (2) cases governing waiver of issues not raised in the district courts; (3) U.S. Supreme Court cases interpreting the Act; and (4) cases involving various regulatory agencies.

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[9] The Tenth Circuit has declared its decision in *James v. Chater*, 96 F.3d 1341, 1343-1344 (10th Cir. 1996) to be "on questionable footing" in light of *Johnson v. Apfel, supra* and *Harwood v. Apfel, supra. See Jones v. Apfel*, No. 99-7039, 2000 WL 3875 (10th Cir. Jan. 4, 2000). Similarly, the Ninth Circuit recently issued a decision which properly limits the Ninth Circuit's decision in *Meanel v. Apfel*, 172 F.3d 1111 (9th Cir. 1999) to situations where claimants attempt to introduce new evidence on appeal which should have been introduced administratively. *See Silveira v. Apfel*, ___ F.3d ___, Nos. 97-56186, 98-55225 (9th Cir. Mar. 3, 2000). The Seventh and the Eighth Circuits have clearly ruled that issue exhaustion does not apply in Social Security cases. *See Johnson v. Apfel, supra; Harwood v. Apfel, supra.*

The Commissioner is left with only the Sixth Circuit and the Fifth Circuit cases supporting issue exhaustion in Social Security cases, neither of which is analytically sound. *See Harper v. Secretary of Health and Human Servs.*, 978 F.2d 260, 265 (6th Cir. 1992) and *Paul v. Shalala*, 29 F.3d 208, 210 (5th Cir. 1994).

A. The Commissioner's Reliance, By Analogy, To Habeas Corpus Cases Is Misplaced Due To Fundamental Differences Between Adversarial Criminal Proceedings And Nonadversarial Informal Social Security Proceedings.

The Commissioner's decision to rely on habeas corpus cases by analogy demonstrates the Commissioner's failure to acknowledge the fundamental differences between the nature of adversarial and highly formalized criminal proceedings and the non-adversarial informal nature of Social Security proceedings.

In habeas corpus cases, a prisoner against whom a judgment has already been entered seeks federal court review to determine if the prisoner is "in custody in violation of the Constitution or laws or treaties of the United States." *Coleman v. Thompson*, 501 U.S. at 730. Federal courts apply the doctrine of independent and adequate state ground to decide whether they should address the claims of state prisoners in these actions. *Id.* The doctrine bars federal habeas when a state court declined to address federal claims because the prisoner failed to meet a state procedural requirement. *Id.* The application of the independent and adequate state ground doctrine is "grounded in concerns of comity and federalism." *Id.* at 730.

None of these considerations exist in Social Security cases. The Appeals Council is not a court of another sovereignty with concurrent powers. Principles of comity and federalism have no place in litigation involving statutorily-authorized appeals from a federal administrative agency decision to federal district court. The Appeals Council and ALJs are generally not even permitted to apply case law,[10] clearly differentiating them from a state court that is empowered to apply the same body of case

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[10] ALJs and the Appeals Council are permitted to apply case law only if required to do so by a ruling issued by the Social Security Administration ("SSA"). *See* Amici Br. at 8-14.

law regarding whether a prisoner is being lawfully detained.

Criminal defendants are also accorded significant due process rights – including the right to jury trials, the application in full force of the rules of evidence, and the right to cross-examine witnesses. Social Security proceedings are non-adversarial, without application of the formal rules of evidence. *See Richardson v. Perales*, 402 U.S. 389 (1971). The Commissioner has not pointed to any regulation or statute that requires issue exhaustion. By way of contrast, habeas corpus cases involve prisoners who failed to follow *established state court procedural appellate requirements*. The Commissioner improperly attempts to mix "apples" and "oranges" by suggesting that the Court rely on case law governing habeas corpus cases.

B. The Commissioner's Reliance, By Analogy, To Issue Waiver As Applied Between A District Court And A Circuit Court Is Misplaced.

The Commissioner also improperly analogizes to the doctrine of appellate practice requiring the preservation of issues in the lower court. Resp't Br. at 39. The analogy is unconvincing. Indeed, in *FCC v. Pottsville*, Justice Frankfurter expressly counseled against the careless application of appellate judicial procedure to judicial review of *agency action*. *FCC v. Pottsville Broad. Co.*, 309 U.S. 134, 144 (1940). In *Harwood v. Apfel, supra*, the Eighth Circuit stated that there were "obvious" reasons why a circuit court – an adversarial forum – would not review issues that parties did not raise to the district court, another adversarial forum. *See Harwood*, 186 F.3d at 1043.

The Commissioner erroneously relies on *Virginia Bankshares v. Sandberg*, 111 U.S. 1083, 1099 n.8 (1991) and *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 148 n.2 (1970). The Court, in both of these decisions, indicated that *if the court below examined the issues*, it would consider the

issues raised on appeal for the first time.[11] When a claimant seeks review of an ALJ decision, the Appeals Council is *required* to examine the entire case and determine if there are errors of law or if the decision is not based on substantial evidence. *See* 20 C.F.R. § 404.970. Regardless of whether the Appeals Council ultimately decides to grant a claimant's request for review, the Appeals Council is at least *required to consider all the issues.*

The relationship between the Appeals Council and the judiciary is easily distinguishable from the relationship between the federal district and circuit courts. Because the SSA does not allow its adjudicators to apply court decisions directly, the Appeals Council generally does not countenance arguments based on case law.[12] *See* Amici Br. at 8; Pet'r Br. at 37-38. In contrast, an appellate court and a lower court apply the same law.

Proceedings before the Appeals Council are informal and non-adversarial, as compared with the formal adversarial nature of district court proceedings. Pursuant to Section 404.970(a), the Appeals Council is required to consider all issues, as opposed to the district court that is generally only required to address the issues raised by

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[11] In Ms. Sims' case, the district court considered the merits of her second and third arguments that the Fifth Circuit subsequently refused to consider on jurisdictional issue exhaustion grounds.

[12] It would not be unusual for a claimant to make entirely different arguments in federal court than before the Appeals Council. A claimant reasonably omits any reference to case law in arguments to the Appeals Council. Indeed, in denying a Request for Review, the Appeals Council typically acknowledges, as it did in Ms. Sims' case, that it only considered "applicable statutes, regulations, and rulings in effect as of the date of this action." J.A. at 72.

the parties. Appeals Council functions are generally performed by non-attorneys, while highly-skilled legal professionals are used at the federal district court level.[13] The Appeals Council generally provides no reasons for denying review. District courts provide rationales for their decisions. *See* Pet'r Br. at 33-38. Based on the foregoing, the Appeals Council cannot be fairly compared to the federal judiciary. As noted by Chief Judge Posner, even before the publication of the SSA's Appeals Council Process Improvement ("ACPI") Action Plan,[14] "the Appeals Council operates more like a complaint bureau than an appellate court." *Johnson v. Apfel*, 189 F.3d at 563. The reasoning that supports the application of waiver doctrine between district and circuit courts clearly does not apply to Social Security appeals.

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[13] In March 2000, the SSA published the Appeals Council Process Improvement ("ACPI") action plan. *See* Lodging filed by Ms. Sims on March 21, 2000. The ACPI plan notes that the Appeals Council received a 66% increase in requests for review in FY 1999 since FY 1994 and that the average processing time for a request for review has nearly quadrupled to 460 days during the same time period. The number of pending cases has grown over 500%. Indeed, in 1999, the Appeals Council received 115,150 requests for review. Due to this dramatic growth in its workload, commencing on April 1, 2000, non-attorney analysts will not only evaluate pending requests for review but will be required to "present cases orally to adjudicators." Thus, adjudicators will not even physically review the majority of files – they will be solely reliant on the content of an oral presentation by a non-attorney analyst who is under strict time constraints to meet "production" goals.

[14] *See* footnote 13.

C. In Support Of The Application Of Issue Exhaustion In Social Security Cases, The Commissioner Incorrectly Relies On U.S. Supreme Court Decisions Interpreting The Social Security Act.

The Commissioner asserts that "administrative default principles are fully applicable to the Appeals Council process," relying primarily on *Richardson v. Perales, supra*, and also noting *Weinberger v. Salfi*, 422 U.S. 749 (1975); *Bowen v. City of New York*, 476 U.S. 467 (1986); and *Heckler v. Ringer*, 466 U.S. 602 (1984). Resp't Br. at 32. The Commissioner's reliance on the foregoing cases is misplaced and confuses the distinction between issue exhaustion and exhaustion of administrative remedies with respect to a claim.

In *Bowen v. City of New York*, *Weinberger v. Salfi*, and *Heckler v. Ringer*, this Court considered whether the claimant satisfied the requirement to exhaust administrative remedies as set forth in 42 U.S.C. § 405(g). The Court recognized that exhaustion of administrative remedies under Section 405(g) requires a final decision as a statutorily-specified jurisdictional prerequisite. *Salfi* at 766. The Court further noted that the definition of "final decision" should be left to the SSA "to flesh out by regulation." *Id.* As evidenced by the stark nature of the regulations governing Appeals Council review, the Commissioner has not created any additional exhaustion requirements other than the ones already acknowledged by this Court.

The Commissioner cites *Richardson v. Perales* in support of his argument that "at least where a disability claimant is represented by counsel, he may be foreclosed from raising particular objections to the conduct of the administrative process if he fails to assert his rights in a timely fashion." Resp't Br. at 34. (Citations omitted). The Commissioner misinterprets *Richardson v. Perales*. In *Richardson v. Perales*, this Court held that a written report by an examining physician could be received as evidence in

a Social Security proceeding and could constitute substantial evidence, despite its hearsay character, the absence of cross-examination, and the presence of opposing testimony. *Id.* The Court relied on the existence of both a statute that explicitly empowered the SSA to issue subpoenas requiring attendance and testimony of witnesses and production of evidence and a regulation that provides that a claimant may request the issuance of subpoenas. *See* 42 U.S.C. § 405(d) and 20 C.F.R. § 404.926. In contrast, there is no statute or regulation at issue that requires issue exhaustion, easily distinguishing this case from *Richardson v. Perales.*

D. The Commissioner Incorrectly Analogizes To The Application Of Issue Exhaustion In Administrative Appeals In Other Regulatory Agencies.

The Commissioner cites numerous cases where appellate courts applied issue exhaustion principles to prevent a plaintiff from receiving judicial review of an issue not raised administratively. *See* Resp't Br. at 30-31, n.26. However, in nearly every case, the underlying regulatory or statutory scheme either required the petitioner to raise specific issues at the administrative level or was adversarial in nature. For example, *Hix v. Director, OWCP,* 824 F.2d 526 (6th Cir. 1987) and *Director, OWCP, v. North Am. Coal Corp.,* 626 F.2d 1137 (3d Cir. 1980) both involved arguments that were not presented by the plaintiffs to the agency, even though applicable regulations required issue specificity. *See* 20 C.F.R. § 802.211(b). Similarly, in *Sears Roebuck & Co. v. FTC,* 676 F.2d 385, 398 n.2 (9th Cir. 1982), although the Ninth Circuit applied issue exhaustion principles, the court specifically noted that the Federal Trade Commission's Rules of Practice required any party to specify the questions intended to be urged, citing 16 C.F.R. § 3.52(3) (1981).

Many of the cases cited by the Commissioner involve appeals from decisions of the Interstate Commerce Commission ("ICC"), the Environmental Protection Agency ("EPA"), and the Federal Communications Commission ("FCC"). Each of these agencies has enacted or abides by detailed statutory and/or regulatory provisions that require the petitioner to specify issues to be considered on appeal. While the Second Circuit declined to consider an issue not raised before the ICC in *Railway Labor Executives' Ass'n v. U.S.,* 791 F.2d 994, 1000 (2d Cir. 1986) because it was not raised administratively, the underlying regulations required the plaintiff to specify its issues in its objection to the abandonment proceedings. *See* 49 C.F.R. § 1152.5 (1986). In *State of Alabama v. U.S. Environmental Protection Agency,* 911 F.2d 499, 505 (11th Cir. 1990), the Eleventh Circuit refused to consider issues not raised by the petitioners to the EPA Administrator, reasoning that 40 C.F.R. § 124.91 specifically required the petitioners to include a statement of the supporting reasons for the appeal. An underlying statute requiring issue exhaustion was relevant in entertaining claims against the FCC. *See Omnipoint v. FCC,* 78 F.3d 620, 635 (D.C. Cir. 1996). In *Rana v. United States,* 812 F.2d 887, 889-890 (4th Cir. 1987), a Merit Systems Protection Board ("MSRB") case, the court properly applied issue exhaustion principles as required by the regulations governing MSRB review that specifically require the petitioner to list objections. *See* 5 C.F.R. § 1201.115.

Other agency proceedings are distinguishable from Social Security proceedings by virtue of their inherently adversarial nature or due to the publication of agency decisions of regulatory law. For example, proceedings before the Commodity Futures Trade Commission are adversarial, thus making issue exhaustion more reasonable. *See Myron v. Chicoine,* 678 F.2d 727 (7th Cir. 1982). The Commissioner also erroneously relies on *Edwards v. Dept. of the Navy,* 708 F.2d 1344 (8th Cir. 1993), an Equal Employment Opportunity Commission case. In *Edwards,*

the EEOC dismissed a complainant's charge of discrimination because it was too general and failed to contain any specific allegations. The court held that the complainant failed to exhaust his administrative remedies, reasoning that the agency could not render a decision without an allegation "personal to the Title VII complainant." *Id.* at 1347. In contrast, the Appeals Council does not need any additional information from the claimant to conduct its review.

As the foregoing summary illustrates, although courts sometimes impose issue exhaustion in appeals of agency action, issue exhaustion is largely a creature of statute or regulation. *See Marine Mammal Conservancy, Inc. v. Dept. of Agriculture*, 134 F.3d 409, 412 (D.C. Cir. 1998). There are no statutes or regulations that require issue exhaustion in this case.

It is critical to distinguish Social Security proceedings from those of most other agencies. Social Security proceedings are non-adversarial, inquisitorial, and informal.[15] The substantial distinctions between the informal non-adversarial SSA hearing adjudication model and the traditional adversary model employed by courts and regulatory administrative agencies, compel different expectations. *See* Pet'r Br. at 34. In the non-adversarial or "inquisitorial" SSA administrative model, the ALJ is charged with the duty of protecting the claimant's rights, developing the facts on the claimant's behalf, and identifying the issues, whether or not the claimant is represented. *See Harwood*, 186 F.3d at 1042-43. The Appeals Council's structure and operating reality further provide strong prudential justifications against issue exhaustion,

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[15] By comparison, the Federal Republic of Germany, in common with most continental systems, provides an example of a modern inquisitorial legal system which does not impose issue exhaustion. *See* Jon C. Dubin, *Torquemada Meets Kafka: The Misapplication of the Issue Exhaustion Doctrine to Inquisitorial Administrative Proceedings*, 97 Colum. L. Rev. 1289, 1301, n.51 (1997).

as the Appeals Council is required by regulation to consider all the issues. *See* 20 C.F.R. § 404.970.

Not only are the purposes for issue exhaustion not served in Social Security cases, but prudential exceptions also apply. Pet'r Br. at 28-42. As noted above, it is generally futile to raise issues before the Appeals Council due to its "complaint bureau" operating reality. *See* Pet'r Br. at 35-37.

Another exception to the application of issue exhaustion is where the issue is "purely legal." Indeed, the Ninth Circuit recently applied this doctrine in *Silveira*, refusing to apply issue exhaustion to a Social Security claimant who did not raise an issue *either* before the district court or the Appeals Council. *See Silveira*, n.8. The Ninth Circuit held that where new evidence was not introduced in district court, issue exhaustion did not apply because the newly submitted issue was "a pure question of law and the SSA would not be unfairly prejudiced by [the claimant's] failure to raise it below." *Id. See also Atlantic Richfield v. U.S. Dept of Energy*, 769 F.2d 771, 782 (D.C. Cir. 1985); *Cf. Nixon v. Fitzgerald*, 457 U.S. 731, 743 n.23 (1982); *U.S. v. Krynicki*, 689 F.2d 289, 291-292 (1st Cir. 1982).

III. WHETHER OR NOT A CLAIMANT IS REPRESENTED DOES NOT VITIATE THE COMMISSIONER'S OBLIGATION TO COMPLY WITH FUNDAMENTAL DUE PROCESS CONSIDERATIONS.

The Commissioner argues that Ms. Sims had fair warning that arguments raised before the Appeals Council would be barred on judicial review and that her attorney should "fairly be charged with knowledge of [issue exhaustion]. Resp't Br. at 15.[16] As argued in the Brief for

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[16] The Commissioner's argument that *Paul v. Shalala* provided adequate notice to Ms. Sims' attorney is weak, given

the Petitioner, by advertising an informal, non-adversarial Appeals Council process, by encouraging claimants to present their issues in a three-line space, and by failing to provide an issue waiver warning along with the other appellate review warnings in the notice of unfavorable ALJ decision, the SSA's notice to claimants is not merely unclear; it is deceptive and misleading regarding the consequences of their administrative appeals. *See* Pet'r Br. at 42-49.

Misleading notice – as an act of commission rather than omission – raises stronger prudential and equitable considerations against applying a discretionary, prudential doctrine to bar claims by the victims of that deceptive notice.[17] *Id.* at 46. In evaluating procedural due process claims, the Court has established a three-factor calculus or balancing test for determining what process is due. *Id.* at 49, citing *Matthews v. Eldridge*, 424 U.S. 319, 328 (1976). First, the court must balance the private interest affected by the agency action; second, it must assess the risk of erroneous deprivation of such interest through the present procedure and the probable value of an alternate procedure; and third, it must balance the government interest and administrative burdens that an alternate notice or procedure would impose. *Id.*

In the early 1980's, the courts grappled with the effect of misleading reconsideration notices that failed to inform a claimant of the res judicata consequences of filing a new application instead of appealing the denial decision. In *Gonzalez v. Sullivan*, 914 F.2d 1197, 1203 (9th Cir. 1990), the Ninth Circuit found the 1983 version of the SSA's denial notice to violate a claimant's fifth amendment right to procedural due process, noting that district

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the Commissioner's concession that *Paul* is not based on sound legal principles. *See* footnote 2.

[17] The SSA implicitly concedes some degree of inequity in light of its plans to change the wording on one of its forms. *See* Opp'n Cert. at 11-12; Resp't Br. at 43, n.35.

courts considering the issue had uniformly found the notice inadequate. The Ninth Circuit found that requiring notices to accurately state how a claimant might appeal an initial decision did not impose a significant financial or administrative burden on the Commissioner and that the form of the notice used was sufficiently misleading that it introduced a high risk of error into the disability decision-making process. *Id.* Four years later, in *Day v. Shalala*, 23 F.3d 1052 (6th Cir. 1994), a class action that included represented and unrepresented claimants, the Sixth Circuit also held that the denial notices were inadequate and violated the claimants' fifth amendment right to procedural due process. Neither *Day* nor *Gonzalez* limited their holdings to unrepresented claimants.[18]

Just as in *Day* and *Gonzalez*, the scales in *Mathews v. Eldridge* tip in favor of the Social Security claimant. Requiring the Commissioner to accurately set forth the risk of failing to raise, with specificity, all issues to the Appeals Council to preserve the issues for judicial review does not impose a significant financial or administrative burden on the Commissioner. Indeed, in response to Ms. Sims' certiorari petition, the agency indicated that it would amend some forms to provide more accurate notice of the risk of issue exhaustion in future cases. *See* Opp'n Cert. at 11-12. The Commissioner has offered no conceivable government interest which is served through the continued usage of its misleading forms, notices, and regulations.

As in *Day* and *Gonzalez*, the private interest in SSA benefits and in fairness of the SSA process is high. Moreover, the provision of misleading and deceptive notice results in claimants unintentionally waiving their rights to raise potentially meritorious arguments in federal court in an otherwise informal, non-adversarial process.

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[18] Indeed, two years after *Gonzalez* was decided, the Commissioner finally issued Acquiescence Ruling 92-7(9) that also does not limit *Gonzalez* to unrepresented claimants.

There is a significant risk of error in misleading claimants, even if that risk is somewhat lessened when the claimant is represented. To rule that the agency can mislead represented claimants, but not those who are unrepresented, would be an illogical, unjust and underinclusive result. *See Allentown Mack v N.L.R.B.*, 522 U.S. at 373-75 (decrying the "evil" of an agency's application of a "standard other than the one it enunciates"). Specifically, it is improper for a governmental agency to mislead and deceive claimants, regardless of whether one might expect a sophisticated claimant or representative to be more likely to see through the agency's deception. Because all three *Eldridge* factors tip decidedly in favor of the claimant, the SSA should not be permitted to continue issuing its misleading forms, notices and regulations to any claimants.

IV. THE COMMISSIONER HAS NOT PROPOSED A RATIONAL, EFFICIENT, OR FAIR ISSUE EXHAUSTION RULE.

While the Commissioner does not propose any parameters for application of an issue exhaustion rule to Social Security cases, he appears to maintain that issue exhaustion should apply only to represented parties.[19] He

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[19] The Commissioner states, "moreover, as a matter of policy, the government has not invoked administrative default in suits brought by claimants who were unrepresented during the Appeals Council proceedings" and even argues that amending a form that appoints a representative will resolve pending concerns. Resp't Br. at 41-43. The Commissioner's policies are not always enforced by the SSA litigation attorneys. For example, in *Dorothy Owens v. Apfel*, No. 1:98CV1442 (N.D. Ohio Aug. 3, 1999), rev'd *Dorothy Owens v. Apfel*, No. 99-4178, 2000 WL 191795 (6th Cir. Feb. 7, 2000) (unpublished) (district court decision lodged with the Court on March 21, 2000), the Commissioner argued before the district court that issue exhaustion applied even though the claimant was unrepresented at the Appeals Council level.

does not explain how and if the rule should be applied if the claimant is represented by a non-attorney who is in the business of handling Social Security claims vs. a non-attorney (such as a paralegal) who acts under the auspices of a law firm. He does not explain how and if exhaustion principles should apply to priests, ministers, relatives, friends, or even a parent of a child seeking benefits, who take the role of representing claimants on an as-needed basis.

The Commissioner also does not describe how courts will determine whether an issue has been sufficiently raised to the Appeals Council. The Commissioner suggests that an "inartful statement" is sufficient, while at the same time arguing that Ms. Sims did not adequately raise the issue of her residual functional capacity below.[20] *See* Resp't Br. at 40.

Due to the complex nature of the issues surrounding the imposition of issue exhaustion principles in Social Security cases, the SSA should be required to promulgate regulations setting forth the parameters for the doctrine as applied to the various categories of claimants. The imposition of ad hoc judicially created issue exhaustion is inconsistent with the non-adversarial, informal framework created by Congress for the administration of the national Social Security benefits program. It also likely will result in a groundswell of new procedural litigation over whether, as to a specific case, the issue in question was sufficiently raised administratively, whether prudential considerations require exhaustion, whether the exceptions (such as futility and pure legal issues) apply, and whether the claimant was represented by an individual

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[20] If an "inartful" statement was enough to satisfy the issue exhaustion requirements, Ms. Sims' attorney's correspondence should have been enough to preserve the issues where he specifically discussed her possible carpal tunnel syndrome and the ALJ's failure to credit her resultant limitations. *See* J.A. at 63, 65.

who could have been expected to see through the agency's misleading notices, forms, and regulations.

CONCLUSION

Many agencies have crafted detailed regulations that require specification of issues to be considered on administrative appeal. Others are bound by statutes that require the non-government party to present all issues to the administrative agency. Clearly, if an agency considers issue exhaustion important, the agency can promulgate a valid regulation. The Commissioner, however, invites this Court to make rules about agency proceedings, while the agency itself abstains from rule-making. The imposition of issue exhaustion in Social Security cases is inconsistent with the current statutory and regulatory scheme. Prudential considerations and exceptions strongly indicate that issue exhaustion should not be applied in Social Security cases. Accordingly, this Court should find that issue exhaustion principles do not apply in Social Security cases, reverse the decision of the Fifth Circuit, and remand this case to the Fifth Circuit for consideration of the merits of Ms. Sims' previously dismissed arguments.

Respectfully submitted,

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March 21, 2000

APPENDIX

§ 404.970 Cases the Appeals Council will review.

(a) The Appeals Council will review a case if –

(1) There appears to be an abuse of discretion by the administrative law judge;

(2) There is an error of law;

(3) The action, findings or conclusions of the administrative law judge are not supported by substantial evidence; or

(4) There is a broad policy or procedural issue that may affect the general public interest.

(b) If new and material evidence is submitted, the Appeals Council shall consider the additional evidence only where it relates to the period on or before the date of the administrative law judge hearing decision. The Appeals Council shall evaluate the entire record including the new and material evidence submitted if it relates to the period on or before the date of the administrative law judge hearing decision. It will then review the case if it finds that the administrative law judge's action, findings, or conclusion is contrary to the weight of the evidence currently of record.

No. 98-9537

IN THE SUPREME COURT OF THE UNITED STATES

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KENNETH S. APFEL,
Commissioner of Social Security,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF *AMICI CURIAE* OF AARP; NOSSCR; ET AL.; IN SUPPORT OF PETITIONER

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National Association of Protection and Advocacy Systems (NAPAS);
National Senior Citizens Law Center (NSCLC);
Statewide Parent Advocacy Network of New Jersey

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BRIEF *AMICI CURIAE* OF AARP; NOSSCR; ET AL.; IN SUPPORT OF PETITIONER

INTERESTS OF *AMICI CURIAE*[1/]

This *amici curiae* brief is submitted on behalf of AARP, the National Organization of Social Security Claimants' Representatives (NOSSCR), the American

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[1/] This brief has been authored in its entirety by undersigned counsel for the *amici*. No person or entity, other than the named *amici* and their counsel, made any monetary contribution to the preparation or submission of this brief.

Network of Community Options and Resources (ANCOR), The Arc, Family Voices-New Jersey, Iowa Protection and Advocacy, Inc., the National Association of Protection and Advocacy Systems (NAPAS), the National Senior Citizens Law Center (NSCLC), and the Statewide Parent Advocacy Network of New Jersey. The statement of interests of *amici* is included in the appendix to this brief.

By written consent of the parties, *amici curiae* submit this brief in support of Petitioner.[2/]

SUMMARY OF THE ARGUMENT

In order to exhaust administrative remedies and seek judicial review of a denial of Social Security or Supplemental Security Income (SSI) benefits, a claimant must request review from the Social Security Administration (SSA) Appeals Council. The Appeals Council utilizes up to 55 adjudicators to handle over 100,000 cases per year. These adjudicators usually devote no more than fifteen minutes to an individual case, while claimants typically wait over a year to receive a decision from the Appeals Council either denying or granting a request for review.

Unless specifically authorized, the Appeals Council is precluded by SSA regulations and policy from considering or citing judicial authority, including circuit court precedent within each circuit. The Appeals Council is required to follow SSA's interpretation of the Social Security Act and regulations even when that interpretation has been undercut or rejected by judicial precedent. Therefore, it is futile for

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[2/] Letters of consent from all parties have been filed separately with the Clerk of the Court.

attorneys to bring rules of law or interpretations from relevant case law to the attention of the Appeals Council.

The Due Process Clause of the United States Constitution requires the government to inform affected parties of the procedures to be followed for participation in administrative proceedings. *Memphis Light, Gas and Water Division v. Craft*, 436 U.S. 1, 14 (1978). SSA regulations provide that claimants are required only to "request" Appeals Council review and do not require the filing of briefs, a listing of issues, or detailed legal statements before the Appeals Council. 20 C.F.R. §§ 404.967, 404.968, 416.1467, 416.1468 (1999). Neither the regulations nor SSA's own form for requesting Appeals Council review inform claimants that a failure to raise issues before the Appeals Council will result in a waiver of those issues in court. Moreover, since it is unlikely that a detailed legal statement would be read by legal staff at the Appeals Council, it is unfair to impose issue exhaustion on claimants who do not raise every legal issue before the Appeals Council. If courts refuse to hear meritorious legal claims regarding errors in denying benefits because of the failure to raise these issues at the Appeals Council, then individuals who are truly disabled (or otherwise entitled to Social Security benefits) are likely to suffer extreme hardship.

ARGUMENT

I. BECAUSE OF ITS LIMITED RESOURCES, SSA'S APPEALS COUNCIL PROVIDES NO MORE THAN A CURSORY REVIEW TO THE VAST MAJORITY OF CASES THAT COME BEFORE IT.

Congress has established two separate but interrelated programs providing benefits to individuals who are disabled: Social Security Disability Insurance (SSDI) under Title II of the Social Security Act, 42 U.S.C. §§ 401-433 (1999), and Supplemental Security Income (SSI) under Title XVI of the Social Security Act, 42 U.S.C. §§ 1381-1383f (1999). The administrative appeals process is identical for these two programs.

SSA's Appeals Council is the fourth and final administrative step for claimants seeking disability benefits under the Social Security Act.[3/] Claims are considered first on an initial application. A claimant denied benefits may seek reconsideration. If denied again, a claimant may obtain a *de novo* hearing before an SSA administrative law judge (ALJ). If denied again, a claimant may request review of the hearing decision by SSA's Appeals Council as a prerequisite for seeking judicial review in federal district court. Additionally, the Appeals Council may perform "own motion" review of an ALJ decision which is favorable to a claimant.

[3/] *See generally Bowen v. City of New York*, 476 U.S. 467, 472 (1986).

Because it lacks sufficient resources, the Appeals Council is often not able to provide meaningful review of the denial of benefits. Over a decade ago, an exhaustive study performed under the auspices of the Administrative Conference of the United States (ACUS) resulted in the conclusion that the Appeals Council was deeply flawed and not performing to anyone's satisfaction because the size of the then current caseload defied effective management.[4/] At the time of that study, by Fiscal Year (FY) 1988, the Appeals Council was receiving annually approximately 81,500 requests for review.[5/] By FY 1999, that figure had swelled to over 115,000.[6/]

In 1987, the ACUS review suggested that in a typical case, members of the Appeals Council examine the paper record for less than 15 minutes.[7/] But even this admittedly

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[4/] *See* Charles H. Koch, Jr. & David A. Koplow, *The Fourth Bite of The Apple: A Study of the Operation and Utility of The Social Security Administration's Appeal Council*, 17 FLA. ST. U. L. REV. 199, 202 n.1, 318-319 (1990).

[5/] *Id.* at 242 n.233.

[6/] OFFICE OF HEARINGS AND APPEALS, SOCIAL SECURITY ADMINISTRATION, KEY WORKLOAD INDICATORS HEARINGS - APPEALS - CIVIL ACTIONS - ATTORNEY FEES ("KEY WORKLOAD INDICATORS") 19 (1999).

[7/] *See* Administrative Conference of the United States, A New Role for the Social Security Appeals Council, 52 Fed. Reg. 49141, 49143 (1987) (codified at 1 C.F.R. § 305.87-7). Even though the Appeals Council considers every request for review, it only awards benefits in approximately 2% of cases and remands approximately

(continued...)

cursory handling of cases by the Appeals Council in 1987 was better than the current situation, as requests for review climbed by well over 50% between FY 1993 and FY 1999.[8/]

The figures reveal the inevitable reality of the scarce amount of time devoted to an individual case at the Appeals Council level. In FY 1998, the Appeals Council disposed of approximately 100,000 cases.[9/] The legal staffing at the Appeals Council consists of positions for 30 Administrative Appeals Judges (AAJs) and 25 Appeals Officers (AOs).[10/] Thus even when all of these positions are filled, there are only 55 adjudicators, who if they act singly each decides over 1,800 cases per year. Although the AAJs and AOs also have staff analysts to assist them, staff analysts are not required to be attorneys.

As the time spent by adjudicators at the Appeal Council per case has diminished, the overall processing time

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[7/] (...continued)
18% of cases. When a request for review is denied, it is extremely unlikely that the Appeals Council will have carefully considered legal objections raised by claimants. Richard Posner, THE FEDERAL COURTS, CRISIS AND REFORM 161 (1985). It is normal practice for the Appeals Council not to provide any explanation when it denies review.

[8/] KEY WORKLOAD INDICATORS, *supra* note 6, at 19.

[9/] *Id.*

[10/] The AOs have authority, on their own, only to deny requests for review, not to grant them. 20 C.F.R. § 422.205(c) (1999). A minimum of two AAJs are required to review a case when a request for review has been granted. 20 C.F.R. § 422.205(b) (1999).

has skyrocketed. In FY 1994, the average processing time in the Appeals Council was 126 days. By FY 1998, that figure was 417 days, and incomplete data for FY 1999 showed an average wait of 441 days.[11/] Commissioner Apfel recently testified that claimants now must "wait more than a year for an Appeals Council decision...."[12/]

Meanwhile, during the period of FY 1993 to FY 1998, as receipts of requests for review rose and time spent per case fell, the percentage of cases in which the Appeals Council reversed the denial of benefits dropped from 3.3% to 2.1%.[13/]

Given the low number of legal staff, the most likely persons to read legal arguments filed at the Appeals Council are the analysts, who generally are not lawyers. The analysts are responsible for reviewing hearing tapes and medical records of more than 100,000 claimants per year.

Moreover, the Appeals Council generally does not respond to claimants' arguments when a request for review is denied.[14/] Instead, typical denial notices consist of boilerplate

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[11/] KEY WORKLOAD INDICATORS, *supra* note 6, at 23.

[12/] *Disability Oversight, Committee on Ways and Means, Subcommittees on Social Security and Human Resources* 7 (Oct. 21, 1999)(statement of Kenneth S. Apfel).

[13/] KEY WORKLOAD INDICATORS, *supra* note 6, at 23. During the same period, Appeals Council remands dropped from 27% to 18.3%. *Id.*

[14/] Jon C. Dubin, *Torquemada Meets Kafka: The Misapplication of the Issue Exhaustion Doctrine to Inquisitional Administrative*
(continued...)

language that does not inform the claimant or the reviewing court of the Appeals Council's reasoning but only states that the request has been denied. For the vast majority of cases reaching the courts, the ALJ decision from over a year earlier provides the only explanation of the agency's rationale. The first opportunity for meaningful review of legal challenges to the ALJ's reasoning arises in court, although judicial review may not be obtained until the Appeals Council has denied the claimant's request for review.

II. AN ISSUE EXHAUSTION REQUIREMENT IS OFTEN FUTILE, SINCE SSA REFUSES TO ALLOW ITS ADMINISTRATIVE APPEALS JUDGES TO APPLY CONTROLLING CASE LAW.

Because SSA will not allow its judges and appeals officers to apply federal court decisions directly, the Appeals Council generally will not consider legal arguments based on case law. At the administrative level, Social Security law is comprised of detailed SSA regulations promulgated in the Federal Register and annually codified in Title 20 C.F.R. Parts 400-499, as well as less generally known sub-regulatory authority such as Social Security Rulings (SSRs),[15/] the

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[14/] (...continued)
Proceedings, 97 COLUMBIA L. REV. 1289, 1329 (1997) (citing letter from William C. Taylor, Executive Director, Office of Appellate Operations, Social Security Administration Appeals Council, to Nancy Shor, Executive Director, National Organization of Social Security Claimants' Representatives 1 (July 28, 1995)(on file with the Columbia Law Review)).

[15/] *See* 20 C.F.R. § 402.35(b) (1999).

Hearings, Appeals and Litigation Law (Lex) (HALLEX) Manual, and the Program Operations Manual System (POMS). At the level of federal court review, it is comprised of an enormous body of case law. West's United States Code Annotated lists 1,626 *headings* for annotations to 42 U.S.C. § 405, "Evidence, procedure and certification for payments," as well as 428 *headings* for annotations to 42 U.S.C. § 423, "Disability insurance benefit payments."

SSA instructs its administrative judges to adhere to the regulations and Social Security rulings but not to apply judicial holdings to cases before them. SSA's Office of the General Counsel has advised ALJs that they are "bound to follow Agency Policy even if, in the ALJ's opinion, the policy is contrary to law."[16/]

Instead of permitting its administrative judges to apply case law, SSA reviews decisions of the Courts of Appeals. If SSA determines that a decision conflicts with SSA's interpretation of the Social Security Act or regulations, and if it chooses not to seek further judicial review of the decision, then SSA will issue an "Acquiescence Ruling." The Acquiescence Ruling explains how SSA and its personnel will apply the judicial decision. 20 C.F.R. §§ 404.985(a), (b), 416.1485(a), (b) (1999).

Such Acquiescence Rulings are issued as Social Security Rulings which are binding on all components of SSA,

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[16/] Memorandum from Social Security Administration, Office of the General Counsel, Legal Foundations of the Duty of Impartiality in the Hearing Process and its Applicability to Administrative Law Judges 5-6 (Jan. 28, 1997).

including the AAJs and AOs of the Appeals Council.[17] Therefore, SSA personnel are allowed to cite the Acquiescence Ruling (if there is one), not to apply the case. Indeed, Social Security Ruling (SSR) 96-1p explicitly states SSA's purposes as follows:

> *Purpose*: To clarify longstanding policy that, unless and until a Social Security Acquiescence Ruling (AR) is issued determining that a final circuit court holding conflicts with the Agency's interpretation of the Social Security Act or regulations and explaining how SSA will apply such a holding, SSA decisionmakers continue to be bound by SSA's nationwide policy, rather than the court's holding, in adjudicating other claims within that circuit court's jurisdiction. This Ruling does not in any way modify SSA's acquiescence policy to which the Agency continues to remain firmly committed, but instead serves to emphasize consistent adjudication in the programs SSA administers. This Ruling is also issued to clarify longstanding Agency policy that, despite a district court decision which may conflict with SSA's interpretation of the Social Security Act or regulations, SSA Adjudicators will continue to apply SSA's nationwide

[17] *Id. See Sullivan v. Zebley*, 493 U.S. 521, 530 n.9 (1990).

> policy when adjudicating other claims within that district court's jurisdiction unless the court directs otherwise.[18]

The General Counsel of SSA recently defended this policy in testimony in opposition to a bill to require SSA adjudicators to follow circuit court precedent, stating:

> By requiring each of the more than 32,000 individuals who rule on SSA claims (including, but not limited to, ALJs) to individually apply their own interpretation of Court of Appeals decisions without guidance from the Commissioner, would greatly undermine the fairness and consistency in our decisionmaking process.
>
> If each of SSA's thousands of decisionmakers were responsible for interpreting circuit court holdings, it could result in conflicting decisions by different decisionmakers, even within the same office.[19]

SSA's regulation explicitly states that it "*will release* an Acquiescence Ruling for publication in the Federal Register for any precedential circuit court decision that *we determine* contains a holding that conflicts with our interpretation of a

[18] 61 Fed. Reg 34470 (July 2, 1996).

[19] *See generally Acquiescence, Hearing before the House Judiciary Committee, Subcommittee on Commercial and Administrative Law* (Oct. 27, 1999)(statement of Arthur J. Fried, Office of General Counsel, Social Security Administration).

provision of the Social Security Act or regulation *no later than 120 days from receipt of the court's decision*." 20 C.F.R. §§ 404.985(b)(1), 416.1485(b)(1) (1999)(emphasis supplied). Interestingly, in his testimony, SSA's General Counsel repeatedly referred to this provision as setting a *goal* of publishing Acquiescence Rulings within 120 days, and he claimed that SSA is complying with this goal.[20/]

SSA has been justly criticized both for taking a very limited view of when circuit court rulings conflict with its own interpretation and for failing to issue Acquiescence Rulings in a timely fashion.[21/] There are significant practical ramifications resulting from SSA's limited policy of acquiescence. If an attorney believes that a federal court precedent compels the overturning of an ALJ decision denying a client benefits, it is futile for the attorney to raise that precedent to the Appeals Council which is forbidden to apply it.

[20/] *Id.*

[21/] Indeed, on October 26, 1999, the day before SSA's General Counsel testified that SSA is meeting its "goal" of issuing Acquiescence Rulings within 120 days, the agency issued Acquiescence Ruling 99-4(11), acquiescing in a circuit court decision handed down sixteen and a half years earlier, in April 1983. 64 Fed. Reg. 57687-57689 (Oct. 26, 1999). *See generally Hearing on H.R. 1294 Before the Subcommittee on Commercial and Administrative Law of the House Committee on the Judiciary* (Sept. 16, 1999)(statement of the Hon. Walter K. Stapleton of the United States Court of Appeals for the Third Circuit, on behalf of the Judicial Conference of the United States, and statement of John H. Pickering, on behalf of the American Bar Assoc.).

Moreover, issue exhaustion only makes sense when the administrative and judicial forums are applying the same legal standard. Yet, SSA forbids the Appeals Council from applying cases which have not been addressed in an Acquiescence Ruling, while district courts within a circuit are required to follow their circuit court's decisions as soon as they are issued. When the administrative proceeding is actually applying different legal standards than the reviewing court, counsel may seek to frame the case quite differently in the two forums. The claimant should not be precluded from reformulating the relevant issues when the case reaches the district court.

The practical problems caused by SSA's limited acquiescence in circuit court rulings are best illustrated through an example. Under SSA's regulations, a person who is terminally ill with Hodgkin's disease will be entitled to benefits if he can show that the disease is "not controlled by prescribed therapy."[22/] On June 25, 1999, the United States Court of Appeals for the Third Circuit decided a case in which SSA had denied benefits to a claimant with Hodgkin's disease because a nontreating doctor had reported that the claimant was "responding to" chemotherapy. SSA argued to the circuit court that when a person who suffers from Hodgkin's disease is "responding to" chemotherapy, the illness is "controlled by the prescribed treatment." The Third Circuit expressly rejected that interpretation: "We hold that 'control,' as used here, means that the treatment has been so successful that the disease can be considered effectively neutralized." *Schaudeck v. Commissioner of SSA*, 181 F.3d 429, 432 (3rd Cir. 1999). Now, 209 days later, SSA has neither issued an Acquiescence Ruling regarding *Schaudeck*, nor sought review of *Schaudeck*

[22/] 20 C.F.R. Part 404, Subpart P, App.1, Listing 13.06A (1999).

in this Court, despite the fact that the Third Circuit clearly rejected SSA's interpretation of its own regulation.

If counsel for a claimant residing within the Third Circuit cited *Schaudeck* to any adjudicator at any level within SSA, including the Appeals Council, that adjudicator would be compelled by SSR 96-1p to ignore this clear precedent. Indeed, Social Security Ruling 96-1p specifically prohibits any adjudicator, including any AAJ, from applying the court's holding even if the claimant lives within the circuit. Since the Appeals Council is precluded by SSA from following *Schaudeck,* it would be unfair to bar judicial consideration of this issue based on the claimant's failure to raise the issue in a request for Appeals Council review.

III. SOCIAL SECURITY AND SSI CLAIMANTS HAVE NOT RECEIVED PROPER NOTICE PURSUANT TO THE DUE PROCESS CLAUSE REGARDING ISSUE EXHAUSTION.

The Court has repeatedly held that when the government conducts proceedings affecting the interests of citizens, the government must inform affected parties of the procedures to be followed for participation in these proceedings. In *Mullane v. Central Hanover Trust Co.*, 339 U.S. 306 (1950), the Court stated:

> An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.

Id. at 314. Similarly, in *Memphis Light, Gas and Water Division v. Craft*, 436 U.S. 1, 14 (1978), the Court stated that the "purpose of notice under the Due Process Clause is to apprise the affected individual of, and permit adequate preparation for, an impending hearing."

The Court has previously analyzed the Social Security statute and regulations and concluded that:

> there emerges an emphasis upon the informal rather than the formal. This, we think, is as it should be, for this administrative procedure, and these hearings, should be understandable to the layman claimant, should not necessarily be stiff and comfortable only for the trained attorney, and should be liberal and not strict in tone and operation. This is the obvious intent of Congress so long as the procedures are fundamentally fair.

Richardson v. Perales, 402 U.S. 389, 400-401 (1971).

The Social Security regulations do not preclude the claimant from raising new issues at any stage of the administrative proceedings. The regulations provide that "any party may raise a new issue" at a hearing before an ALJ, "even though [the issue] arose after the request for a hearing and even though it has not been considered in an initial or reconsidered determination." 20 C.F.R. §§ 404.946(b), 416.1446(b) (1999). Similarly, the Appeals Council may review any "error of law" and "abuse of discretion by the

administrative law judge," without consideration of whether the claimant identified these issues during the initial, reconsideration, and ALJ determinations.[23] 20 C.F.R. §§ 404.970(a), 416.1470(a) (1999).

The Social Security regulations provide that a "request" is the only prerequisite to obtaining Appeals Council review. 20 C.F.R. §§ 404.967, 404.968, 416.1467, 416.1468 (1999). The regulations further indicate that the Appeals Council may review cases in which the claimant did not request review and that the Appeals Council may identify or limit issues to be addressed in its review. 20 C.F.R. §§ 404.969, 404.973, 404.976(a), 416.1469, 416.1473, 416.1476(a) (1999). The regulations do not place any burden on the claimant to conduct an exhaustive presentation of all legal issues before the Appeals Council. Indeed, SSA envisions that a request for review by the claimant will take 10 minutes to prepare. 58 Fed. Reg. 28596 (May 14, 1993). Since a "request" is the only legal requirement to obtain Appeals Council review, the regulations do not inform the claimant that the failure to raise issues before the Appeals Council will result in the waiver of those issues in court.

SSA's regulations explicitly provide that the Appeals Council will "conduct the administrative review process in an informal, non-adversarial manner."[24] While the regulations permit claimants to file a brief with the Appeals Council, 20

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[23] The one exception is the requirement in the regulations for the claimant to notify the ALJ if the claimant believes that the ALJ is biased. 20 C.F.R. §§ 404.940, 416.1440 (1999).

[24] 20 C.F.R. §§ 404.900(b); 416.1400(b) (1999). *See also, Richardson v. Perales*, 402 U.S. at 400.

C.F.R. §§ 404.975, 416.1475 (1999), the regulations do not require claimants to do so. Instead, the regulations provide that claimants may use Form HA-520 in order to request Appeals Council review.[25] 20 C.F.R. § 422.205 (1999). This form provides three single spaced lines for the statement of the issues and grounds for appeal. Like SSA regulations, this form does not notify the claimant that issues which are not raised before the Appeals Council will be waived.

The regulations provide that if the Appeals Council denies review, the decision of the ALJ, not the Appeals Council, is binding on the claimant. 20 C.F.R. §§ 404.981, 416.1481 (1999). Far from informing the claimant of issue exhaustion, this regulation suggests that proceedings before the Appeals Council, including any legal arguments presented, are irrelevant when the Appeals Council denies review. The regulations permit the filing of "an action in a Federal district court within 60 days after the date [claimants] receive notice of the Appeals Council action." *Id.* Thus, exhaustion only requires that the claimants have requested review of the ALJ hearing decision by the Appeals Council and have obtained a notice from the Appeals Council that the requests were denied.

The Social Security Act states:

> The findings and decision of the Commissioner of Social Security after a hearing shall be binding upon all individuals

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[25] A copy of Form HA-520 may be found at *Social Security online* (last modified Jan. 18, 2000) <http://www.ssa.gov/online/ha-520.pdf>.

> who were parties to such hearing. No findings of fact or decision of the Commissioner of Social Security shall be reviewed by any person, tribunal, or governmental agency except as herein provided.

42 U.S.C. § 405(h) (1999). The Social Security Act does not require any additional administrative review of the ALJ hearing decision. Pursuant to the Commissioner's power to promulgate regulations, 42 U.S.C. § 405(a) (1999), he created the Appeals Council. The role of the Appeals Council is defined exclusively by regulation, not by statute. Therefore, claimants should be able to rely upon the regulatory instructions for presenting cases to the Appeals Council.

SSA admits that neither the Social Security Act nor the implementing regulations require claimants to "raise an issue before the agency in order to preserve the issue for judicial review." Brief for the Respondent in Opposition to the Petition for Certiorari, ("Resp. Opp. Cert."), *Sims v. Apfel,* (No. 98-9537) at 6-7. SSA contends that Due Process was satisfied in this case, because it was "well-settled" by the Fifth Circuit in cases such as *Paul v. Shalala*, 29 F.3d 208 (5th Cir. 1994), that claimants were required to present their contentions to the Appeals Council in order to preserve issues for judicial review. Resp. Opp. Cert. at 9.

The Fifth Circuit held in *Paul v. Shalala* as well as in the instant case[26/] that the court lacked jurisdiction to review issues which had not been raised at the Appeals Council. However, in this case and in other cases concerning issue exhaustion in the Social Security context, SSA concedes that courts *do* have jurisdiction to review legal issues which were not raised before the Appeals Council. Resp. Opp. Cert. at 5, n.3. As explained by Chief Judge Posner of the United States Court of Appeals for the Seventh Circuit, the Commissioner conceded that when a claimant failed to brief a particular issue before the Appeals Council, the claimant nevertheless "did *not* fail to exhaust his administrative remedies." *Johnson v. Apfel*, 189 F.3d 561, 563 (7th Cir. 1999).

There is no dispute that the legal reasoning of the Fifth Circuit was incorrect. Claimants who sought review by the Appeals Council but did not raise specific legal issues have nevertheless succeeded in exhausting their administrative remedies. Therefore, courts have *jurisdiction* to review all legal issues raised by claimants in federal court. Since the opinions of the Fifth Circuit were based upon erroneous legal reasoning, these decisions cannot provide constitutionally adequate notice to claimants of the procedures to be followed to preserve judicial review of legal issues.

SSA further asserts that petitioner's attorney was notified of the "judicial practice" of imposing issue exhaustion by published case law in Courts of Appeals other than the Fifth Circuit. Resp. Opp. Cert. at 5-9. However, SSA concedes that there is a conflict among the Courts of Appeals

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[26/] *Sims v. Apfel*, No. 98-60126, slip op. at 2 (5th Cir. Nov. 6, 1998).

regarding whether issue exhaustion applies in the context of Social Security hearings. *Id.* at 10-11. Indeed, Chief Judge Posner reversed previous Seventh Circuit decisions in ruling that issue exhaustion is incompatible with the procedures of the Appeals Council which he considered "more like a complaint bureau than an appellate court." *Johnson v. Apfel*, 189 F.3d at 563. *See also, Richardson v. Perales*, 402 U.S. at 400 (SSA appeals procedures are informal). Far from being "well-settled," the judicial imposition of issue exhaustion in the Social Security context has now been rejected in two circuits. *Johnson v. Apfel*, 189 F.3d at 563; *Harwood v. Apfel*, 186 F.3d 1039 (8th Cir. 1999).

Moreover, a substantial number of claimants are not represented by attorneys[27/] and therefore cannot be expected to sort through the maze of contradictory court opinions. SSA now asserts that it will raise issue exhaustion only when claimants have been represented by counsel or a lay representative,[28/] and the Ninth Circuit seeks to apply issue exhaustion only when claimants are represented by counsel. *Meanel v. Apfel*, 172 F.3d 1111, 1115 (9th Cir. 1999). *Amici* submit that such a trifurcated rule would undermine the uniformity of a national benefits program and could even serve to discourage attorneys from representing claimants before the Appeals Council.

Since the Appeals Council operates informally, it is unfair to apply issue exhaustion to any Social Security or SSI

[27/] Dubin, *supra* note 14, at 1294 n.29.

[28/] Resp. Opp. Cert. at 9. Claimants may be (and often are) represented by non-attorneys during the administrative process. 20 C.F.R. §§ 404.1705, 416.1505 (1999).

claimant, regardless of whether the claimant is represented by counsel or has been constructively "notified" of the judicial doctrine. The Court has previously stated in a case involving an application for Social Security disability benefits that "procedural due process is applicable to the adjudicative administrative proceeding involving the differing rules of fair play, which through the years, have become associated with differing types of proceedings." *Richardson v. Perales*, 402 U.S. at 401 (citations omitted). The Fifth Circuit's judicial requirement that claimants, including unrepresented claimants,[29/] supply detailed legal positions at the Appeals Council, when these legal papers are unlikely to be read by an attorney and are not required by the regulations, violates the "rules of fair play."

"The fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.'" *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965). Because the Appeals Council affords cases only a cursory review by an attorney and a brief review by a non-attorney analyst, the Appeals Council often does not provide a meaningful review of legal issues. The failure of reviewing courts to consider meritorious legal issues offends the Due Process Clause. If legal errors which led to the improper denial of benefits are not corrected, then disabled claimants will be deprived of benefits which are designed by Congress to provide them the necessities of life.

[29/] Unrepresented claimants would be expected to know that they are unable to work but could not possibly be expected to be able to identify procedural errors, such as the incorrect application of the sequential evaluation process. 20 C.F.R. §§ 404.1520, 416.920.

IV. DISABLED CLAIMANTS ARE LIKELY TO SUFFER HARM IF COURTS REFUSE TO CONSIDER MERITORIOUS ISSUES THAT HAVE NOT BEEN RAISED AT THE APPEALS COUNCIL.

Judicial imposition of issue exhaustion can result in the denial of benefits to disabled individuals who meet all the requirements in the Social Security Act and regulations for obtaining benefits. These people have disabling conditions that have persisted through the many years needed to complete four levels of administrative review and satisfy the prerequisites for judicial review.[30/] Because of their disabilities, they are unable to obtain gainful employment which would provide them with the necessities of life. "[M]any disabled persons are forced to subsist on state public assistance programs. Others are left with no means of subsistence."[31/]

> There is no question that the denial of benefits causes extreme hardship to the poor and disabled. Newspaper articles have chronicled the deaths of people from illnesses that SSA said they did not have,

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[30/] Others may be in dire need of benefits as dependents, survivors, or retirees.

[31/] Matthew Diller & Nancy Morawetz, *Intracircuit Non-acquiescence and the Breakdown of the Rule of Law: A Response to Estreicher and Reversz*, 99 Yale L.J. 801, 815-816 (1990)(footnotes omitted).

> from the exertion of returning to work after losing benefits, or from suicide. Many of the survivors join the ranks of the homeless or the institutionalized. Others are forced to forego medical treatment that would improve their health.[32/]

The Court has recognized that Social Security disability benefits and SSI provide "the very necessities of life," and that the wrongful denial of these benefits imposes "trauma" which is "beyond what anyone of normal sensibilities would wish to see imposed on innocent disabled citizens." *Schweiker v. Chilicky*, 487 U.S. 412, 428-29 (1988). The Court has stated that the harm from wrongful denials of Social Security disability benefits can be "irreparable." *Bowen v. City of New York*, 476 U.S. 467, 483-484 (1986).

The Ninth Circuit similarly stated:

> Our society as a whole suffers when we neglect the poor, the hungry, the disabled, or when we deprive them of their rights or privileges. Society's interest lies on the side of affording fair

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[32/] Carolyn Kubitschek, *Social Security Administration Non-acquiescence: The Need for Legislative Curbs on Agency Discretion*, 50 U. PITT L. REV. 399, 410 (1989) (footnotes omitted).

> procedures to all persons, even though the expenditure of governmental funds is required. It would be tragic, not only from the standpoint of the individuals involved but also from the standpoint of society, were poor, elderly, disabled people to be wrongfully deprived of essential benefits for any period of time.

Lopez v. Heckler, 713 F.3d 1432, 1437 (9th Cir. 1983), *vacated on other grounds*, 469 U.S. 1082 (1984). The Eighth Circuit also explained the plight of the individuals denied Social Security disability benefits.

> Claimants who lose or are denied benefits face foreclosure on their homes, suffer utility cutoffs and find it difficult to purchase food. They go without medication and doctors' care; they lose their medical insurance. They become increasingly anxious, depressed, despairing—all of which aggravates their medical conditions.

Polaski v. Heckler, 751 F.2d 943, 951 (8th Cir. 1984) (quoting *Polaski v. Heckler*, 585 F. Supp. 1004, 1013 (D. Minn. 1984)), *vacated on other grounds*, 476 U.S. 1167 (1986).

The Social Security Act was "designed" by Congress "to be 'unusually protective of claimants.'" *Bowen v. City of New York*, 476 U.S. at 480 (quoting *Heckler v. Day*, 467 U.S. 104, 106 (1984)). Judicial imposition of issue exhaustion is inconsistent with the goals of both the Social Security Act and the informal nature of the SSA appeals process. The Act relies upon the courts to remedy erroneous denials of benefits by the Commissioner. Meritorious issues should be heard by the courts to prevent the tragedy of the wrongful denial of the necessities of life to disabled people.

CONCLUSION

For the reasons stated, *amici* urge the Court to reverse the decision below and to remand this case to the Fifth Circuit for consideration of all legal issues raised by petitioner in district court.

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APPENDIX

APPENDIX

INTERESTS OF *AMICI CURIAE*

AARP is a nonprofit membership organization of more than 33 million persons age fifty and older dedicated to addressing the needs and interests of older Americans. Over 2.8 million people between the ages of fifty and sixty-five receive Social Security Disability Insurance. Approximately 1.25 million older Americans receive Supplemental Security Income as disabled individuals. Americans over 65 years of age who receive or claim Social Security retirement benefits will also be affected by this decision. Through education, advocacy, and service, and by promoting independence, dignity, and purpose, AARP seeks to enhance the quality of life for individuals of all ages. AARP has filed numerous briefs before this Court in cases involving people with disabilities, including most recently, *Cleveland v. Policy Management Systems Corp*, 526 U.S. 795 (1999); *American Manufacturers Mutual Insurance Co. v. Sullivan*, 526 U.S. 40 (1999); and *Kimel, et. al. v. Florida Board of Regents*, Nos. 98-791, 98-796, 2000 WL 14012 (Jan. 11, 2000).

The National Organization of Social Security Claimants' Representatives (NOSSCR) is a non-profit corporation. While most NOSSCR members are attorneys in private practice, others work in programs which provide free legal services to the poor. NOSSCR members regularly represent people claiming benefits (usually, but not always, disability benefits) in administrative proceedings before the Social Security Administration (SSA). NOSSCR members also file actions in federal court against the Commissioner of SSA (currently Kenneth S. Apfel) appealing the final administrative denial of clients' claims for such benefits.

These disability benefits have been provided by the Congress through two separate but interrelated programs: Social Security Disability Insurance Benefits (SSDI) under Title II of the Social Security Act and Supplemental Security Income (SSI) under Title XVI of the Social Security Act. This case will have profound implications for the meaningfulness of federal court review, provided by Congress, of denial of claims under both programs. This brief is filed by NOSSCR in a representational capacity on behalf of Social Security and SSI claimants who, by reason of their disabilities, both physical and mental, as well as in many instances their limited education, often cannot protect their own interests through the labyrinthine administrative process, much less judicial review.

The American Network of Community Options and Resources (ANCOR) is a nationwide association of more than 650 private, non-profit, for-profit and family care agencies that together provide support and services to more than 150,000 people with mental retardation and other severe disabilities. ANCOR has thirty years of proven leadership representing private providers at the federal level. The membership serves persons of all ages, income levels, sexes and races in urban, rural and suburban areas–supporting people wherever they live and work. The majority of people to whom ANCOR members provide supports and services are adults with very low incomes who benefit from Social Security disability programs.

The Arc of the United States (The Arc), through its more than 1,000 state and local chapters, is the largest national voluntary organization in the United States devoted solely to the welfare of the more than seven million children and adults with mental retardation and their families. Since its founding in 1950, The Arc has participated actively in the

formulation of public policy with respect to the rights of, and services for, citizens with mental retardation. The Arc (formerly the Association for Retarded Citizens) has participated as *amicus curiae* in numerous cases before this Court that involve the rights of people with disabilities.

Family Voices-New Jersey is a statewide organization dedicated to ensuring quality health care for families of children with disabilities and special health care needs. Family Voices-New Jersey provides information, training, technical assistance and support to families of children with special health care needs to assist them to make positive healthcare decisions for their children, work effectively as partners with healthcare professionals, and secure health coverage that meets their children's special needs. Family Voices-New Jersey is an active participant in the New Jersey SSI Alliance; Mainstreaming Medical Care/Arc of New Jersey; Eastern Paralyzed Veterans' Association Managed Care workgroup, and the Community Health Law Project's Managed Care Advisory Group.

Iowa Protection & Advocacy, Inc. is the state-designated entity charged with the federally mandated function of advocating for the rights of individuals with disabilities in the state of Iowa.

The National Association of Protection and Advocacy Systems (NAPAS) is a membership organization for the nationwide system of protection and advocacy (P&A) agencies. P&As are mandated under various federal statutes to provide legal representation and related advocacy services on behalf of all persons with disabilities in a variety of settings. NAPAS facilitates coordination of P&A activities and provides training and technical assistance to the P&A

network. It has participated as *amicus curiae* in a number of cases before this Court that involve the rights of persons with disabilities, including *Cleveland v. Policy Management Systems Corp.*, 526 U.S. 795 (1999).

The National Senior Citizens Law Center (NSCLC) advocates nationwide to promote the independence and well-being of low-income elderly individuals, as well as persons with disabilities, with particular emphasis on women and racial and ethnic minorities. Much of NSCLC's work focuses on federal benefit programs, including Social Security and Supplemental Security Income. To achieve its goals, NSCLC engages in various advocacy efforts, including litigation, policy analysis, and administrative and legislative advocacy. Established in 1972, NSCLC maintains offices in Washington, DC, and Los Angeles, CA.

The Statewide Parent Advocacy Network of New Jersey (SPAN) is New Jersey's Goals 2000 Parent Information and Resource Center and special education Parent Training and Information Center. SPAN provides information, training, technical assistance, support, and public policy advocacy for families and professionals concerned with quality education and the healthy development of New Jersey's children. SPAN's special focus is on those children at greatest risk due to poverty, disability, special physical or mental health care needs, or other special needs. SPAN sponsors Family Voices-New Jersey; New Jersey Statewide Parent to Parent; the Welfare and Human Rights Monitoring Project; and other projects working to enhance the capacity of families to advocate for their children. SPAN is affiliated with the National Parent Network on Disabilities and the National Coalition of Advocates for Students.